92-1784

Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempt state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products?

2. Does the statutory and regulatory regime that was established after FIFRA was comprehensively revised in 1972 now operate to preempt even those state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were manufactured, labeled, distributed, and sold prior to the 1972 revision of FIFRA and its introduction of an express preemption provision relating to labeling and packaging?

3. Where (i) a previous petition for certiorari in this case presented both of the above questions for review and argued, with respect to each of those two questions, that the holding of the United States Court of Appeals for the Tenth Circuit in this case was contrary to this Court's analysis in the intervening decision of *Cipollone v. Liggett Group, Inc.*, 505 U.S. —— (1992), and (ii) this Court granted that petition without qualification, vacated the judgment of the Court of Appeals in its entirety, and remanded the case for further consideration in light of *Cipollone*, did the Court of Appeals then err by narrowly construing this Court's order and refusing to reconsider the holding that current FIFRA, rather than pre-1972 FIFRA, governs the preemption analysis with respect to state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the comprehensive revision of FIFRA in 1972 and its introduction of an express preemption provision relating to labeling and packaging?

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ARKANSAS-PLATTE & GULF PARTNERSHIP,
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Arkansas-Platte & Gulf Partnership respectfully petitions for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Tenth Circuit, issued after this Court vacated an earlier opinion of the Court of Appeals and remanded the case for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608 (1992).

OPINIONS BELOW

The opinion of the Court of Appeals following remand from this Court is reported at 981 F.2d 1177 (10th Cir. 1993) and is reproduced in the appendix to this petition ("Pet. App.") at 1a. The original opinion of

the Court of Appeals, *see* Pet. App. 30a, is reported at 959 F.2d 158 (10th Cir. 1992). The opinion of the United States District Court for the District of Colorado, *see* Pet. App. 7a, is reported at 748 F. Supp. 1474 (D. Colo. 1990).

JURISDICTION

The opinion and order of the Court of Appeals following remand from this Court was entered on January 5, 1993. *See* Pet. App. 1a. A timely motion for rehearing was denied on February 9, 1993. *See* Pet. App. 48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

> § 136v. Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> * * * *
>
> § 136(p) Label and labeling.—
>
> (1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

1. The federal preemption questions presented here arise out of a products liability suit involving pesticide products containing the chemical pentachlorophenol ("penta"). Petitioner Arkansas-Platte & Gulf Partnership ("AP&G") filed its complaint against respondents The Dow Chemical Company ("Dow") and Van Waters & Rogers, Inc. ("Van Waters") in the District Court for the County of El Paso, State of Colorado, on September 1, 1989. Pursuant to 28 U.S.C. § 1441(a), the case was removed to the United States District Court for the District of Colorado, which had original jurisdiction over the case based on diversity of citizenship. 28 U.S.C. § 1332.

In its complaint, AP&G states, in substance, that it owns certain ranch property in Colorado (the "Property") upon which AP&G's predecessors-in-interest operated a wooden fence post treatment facility from approximately 1960 until 1972. AP&G alleges that the wood treatment facility used penta products that were manufactured, supplied, or distributed by the respondents, and that the Property became contaminated with penta and other chemicals contained in those penta products as a result of drips and spills occurring during the

course of the wood treatment operation. In the fall of 1987, after AP&G had succeeded to ownership of the Property, one of AP&G's employees on the Property informed AP&G that he had received a medical diagnosis of penta poisoning. Subsequent soil tests revealed penta contamination on the Property. AP&G commenced a remediation program on the Property, incurring substantial expense. AP&G alleges that the respondents' failure to provide sufficient warnings regarding their penta products, including their failure to provide any caution against soil contamination, was a direct cause of the Property contamination, and AP&G asserts Colorado state tort law claims of negligence and strict liability based on the alleged failure to warn.

On January 31, 1990, Dow filed a summary judgment motion, which Van Waters subsequently joined in. Among other things, the respondents contended that AP&G's state tort law claims of inadequate warning are preempted by FIFRA. The motion was extensively briefed, oral argument was had (at which time the District Court denied all grounds for summary judgment except that based on FIFRA preemption), and on October 22, 1990, the District Court issued its order denying the respondents' motion for summary judgment on FIFRA preemption grounds. *See* Pet. App. 7a. The respondents' subsequent motion for reconsideration was denied; however, the District Court certified the question of FIFRA preemption for interlocutory appeal to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292(b). *See* Pet. App. 27a.

2. On February 26, 1991, the Court of Appeals granted the respondents' petition for leave to appeal under 28 U.S.C. § 1292(b). *See* Pet. App. 29a. The sole issue on appeal was whether the federal government, through FIFRA, has preempted AP&G's state-law tort claims that are based on the respondents' failure to provide adequate warnings about the harmful effects of the penta products

that were used on the Property by AP&G's predecessors-in-interest from approximately 1960 to 1972. The respondents argued that AP&G's claims are expressly preempted by 7 U.S.C. § 136v(b), which became part of the FIFRA statute in late 1972, and which prohibits states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." Alternatively, the respondents argued that AP&G's claims are impliedly preempted by (i) the current FIFRA's occupation of the field of pesticide labeling and (ii) a conflict between AP&G's claims of inadequate warning and the current FIFRA's regulation of pesticides.

In response, AP&G argued that, under the standards of statutory construction set forth by this Court, only the FIFRA statute and regulations in effect prior to the enactment of the 1972 FIFRA amendments should be considered for purposes of the preemption analysis in this case, where the respondents' acts and omissions that gave rise to AP&G's claims occurred prior to the 1972 enactment, and where Congress expressly directed that, for purposes of determining liability to third persons in respect of any act or omission occurring prior to the 1972 FIFRA enactment, FIFRA should be treated as if the 1972 legislation had not been enacted. However, AP&G additionally contended that, whether pre-1972 or current federal law is applied, FIFRA does not preempt AP&G's tort claims under this Court's framework for preemption analysis, where, among other things, (i) there is no evidence of any legislative intent to insulate pesticide manufacturers from common-law liability through FIFRA; (ii) FIFRA provides no alternative relief for persons injured by inadequate pesticide warnings, including warnings that have never even been submitted to or approved by either of the federal agencies that have administered FIFRA; and (iii) the agencies that have administered FIFRA have themselves expressed their belief

that FIFRA provides minimum labeling standards, but does not dictate everything that goes on a label and does not relieve a company of its responsibility for providing adequate labeling.[1]

On March 6, 1992, the Court of Appeals issued its original opinion in this case, holding that "state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law." *See* Pet. App. 30a. In reaching that conclusion, the court first rejected AP&G's contention that the FIFRA preemption analysis in this case should be governed by the FIFRA statute and regulations that were in effect when the respondents' allegedly tortious acts and omissions occurred, and instead held that the preemption issue should be analyzed under FIFRA as it currently exists. *See* Pet. App. 32a-35a. The court then acknowledged a conflict in the courts regarding the issue of whether the current FIFRA preempts state tort claims based on labeling and alleged failure to warn. *See* Pet. App. 37a. The Eleventh Circuit had held such claims to be impliedly preempted. *See Papas v. Upjohn Co.*, 926 F.2d 1019, 1021-26 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 112 S. Ct. 3020 (1992), *on remand*, 985 F.2d 516 (11th Cir. 1993). The D.C. Circuit had held such claims to be neither expressly nor impliedly preempted. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539-43 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). In the instant case, the Court of Appeals expressly rejected the D.C. Circuit's holding in *Ferebee* and held that AP&G's tort claims based on inadequate warning and labeling were impliedly preempted by FIFRA. *See* Pet. App. 37a-42a.

On March 20, 1992, AP&G filed a petition for rehearing, as well as a suggestion for rehearing en banc,

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[1] Under FIFRA, companies draft their own product labels; two different manufacturers may therefore have markedly different labels affixed to their chemically identical products.

on the issue of whether the preemption analysis should be governed by FIFRA amendments that were enacted after the respondents' allegedly tortious acts and omissions occurred. The petition for rehearing and the suggestion for rehearing en banc were summarily denied. *See* Pet. App. 46a.

3. On July 30, 1992, AP&G filed its first petition for a writ of certiorari ("AP&G's First Petition") in this Court. AP&G's First Petition presented two questions for review: (i) whether FIFRA preempts state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products, and (ii) whether the statutory and regulatory regime that was established after FIFRA was amended in 1972 now operates to preempt state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the 1972 amendments to FIFRA. *See* AP&G's First Petition at i. AP&G's First Petition contended that both questions had been decided by the Court of Appeals in a manner contrary to this Court's analysis in *Cipollone*, and AP&G's First Petition further stated, with respect to both questions, that this Court should, at a minimum, grant AP&G's petition, vacate the judgment, and remand the case to the Court of Appeals for further consideration in light of *Cipollone*. *See, e.g., id.* at 11, 23, 27.

In their opposition brief to AP&G's First Petition (the "First Opposition Brief"), the respondents acknowledged that two issues were being presented for certiorari review: "Completely apart from its pre-emption argument, Petitioner urges this Court to grant certiorari on the issue of whether the Tenth Circuit should have applied the codification of FIFRA existing prior to the 1972 amendments to the statute." *See* First Opposition Brief at 22. The respondents contended, among other things, that this choice-of-law issue was not addressed in *Cipollone*, so, if

this Court elected to grant certiorari on the other issue, it should nevertheless elect to leave the ruling of the Court of Appeals on the choice-of-law issue undisturbed. *See* First Opposition Brief at 23. In its reply (the "First Reply Brief"), AP&G pointed out that the respondents were merely seeking "to shelter this most questionable aspect of the Tenth Circuit's holding from this Court's review or the Tenth Circuit's reconsideration upon remand." *See* First Reply Brief at 8. AP&G continued to argue that the ruling of the Court of Appeals on the issue was contrary to *Cipollone,* and continued to urge this Court to, at a minimum, grant AP&G's First Petition, summarily vacate the judgment, and remand the case for further consideration in light of *Cipollone*. *See id.* at 10.

On October 13, 1992, this Court granted AP&G's First Petition without limitation, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *Cipollone*. *See* Pet. App. 43a.

4. On October 19, 1992, the Court of Appeals ordered the parties to submit memorandum briefs, of not more than fifteen pages, addressing the applicability of *Cipollone*. *See* Pet. App. 44a. AP&G's brief argued that, in accordance with the *Cipollone* analysis, the Court of Appeals was required to apply the version of FIFRA in effect at the time of the respondents' allegedly tortious acts and omissions to determine whether AP&G's later-accruing common-law tort claims based on those acts and omissions are preempted. AP&G noted that, under such an analysis, there can be no serious contention that AP&G's claims are preempted. Moreover, AP&G argued that, even if the Court of Appeals were to apply the current FIFRA to the preemption analysis, *Cipollone* would require affirmance of the District Court's holding that the respondents had failed to establish that FIFRA preempts AP&G's claims based on the inadequacy of labels on, or warnings relating to, the respondents' pesticide products. In addition, because AP&G believed that

the respondents might continue to attempt to shelter from reconsideration the Court of Appeals' application of current rather than pre-1972 FIFRA, AP&G submitted, for the sole purpose of enabling the Court of Appeals to view the scope of questions that had been presented and arguments that had been made to this Court, a motion to file an "Appellee's Appendix on Remand" containing a copy of AP&G's First Petition, the First Opposition Brief, and the First Reply Brief.

The respondents' memorandum brief regarding *Cipollone* devoted precisely one footnote to the question of whether pre-1972 or current FIFRA should govern the preemption analysis. The respondents conceded that this Court "'apparently vacated the entirety of [the Court of Appeals'] prior decision"; however, the respondents contended that *Cipollone* did not address the choice-of-law issue and suggested that the Court of Appeals should "reaffirm" its prior holding on the issue based on pre-*Cipollone* cases.

On January 5, 1993, the Court of Appeals issued an order denying AP&G's request for oral argument, denying AP&G's motion to file the supplemental appendix submitted with its brief, refusing to reconsider, in light of *Cipollone*, its holding that current FIFRA, rather than pre-1972 FIFRA, applies to the preemption analysis, and holding that, "[t]o the extent that state tort claims in this case require a showing that [the respondents'] labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *See* Pet. App. 1a-6a. In addition, in the final paragraph of its opinion, the Court of Appeals held that *Cipollone* supported its previous judgment in this case, and the court would therefore "adhere" to the opinion that had been vacated by this Court. *See* Pet. App. 6a.

On January 19, 1993, AP&G filed a petition for rehearing, as well as a suggestion for rehearing in banc.

Among other things, AP&G contended that the Court of Appeals had erred in narrowly construing this Court's remand order and refusing to reconsider the issue of whether current FIFRA, rather than pre-1972 FIFRA, should govern the preemption analysis. AP&G urged that, upon reconsideration, the Court of Appeals should hold that pre-1972 FIFRA governs the analysis and does not preempt AP&G's claims. On February 9, 1993, the Court of Appeals summarily denied the petition for rehearing and the suggestion for rehearing in banc. *See* Pet. App. 48a.

REASONS FOR GRANTING THE WRIT

I. AFTER THIS COURT ORDERED RECONSIDERATION IN LIGHT OF *CIPOLLONE*, THE COURT OF APPEALS ERRONEOUSLY REFUSED TO RECONSIDER ITS PRIOR HOLDING THAT CURRENT FIFRA, RATHER THAN PRE-1972 FIFRA, GOVERNS THE PREEMPTION ANALYSIS IN THIS CASE. BECAUSE PRE-1972 FIFRA CLEARLY GOVERNS, AND BECAUSE THERE CAN BE NO SERIOUS CONTENTION THAT PRE-1972 FIFRA PREEMPTS AP&G'S COMMON-LAW CLAIMS, REVERSAL IS NOW WARRANTED.

As this Court has previously noted, *see, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. ——, 111 S. Ct. 2476, 2479 (1991), the statutory and regulatory regime that currently exists under FIFRA is the result of a comprehensive revision of FIFRA undertaken by Congress in 1972 through the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (the "1972 Legislation"). Prior to the 1972 Legislation, FIFRA ("pre-1972 FIFRA") was primarily a licensing and labeling statute that (i) required all pesticides sold in interstate commerce to be registered with the Secretary of Agriculture (the "Secretary")[2] and (ii)

[2] In 1970, regulatory authority under FIFRA was transferred from the Department of Agriculture ("USDA") and its Secretary

contained "general standards setting forth the types of information necessary for proper labeling of a registered pesticide . . . ." *Monsanto,* 467 U.S. at 991. Like the current FIFRA, pre-1972 FIFRA had no provisions for private actions or for compensation for injuries caused by pesticides.

The limited role of pre-1972 FIFRA, even in the area of product labeling, is apparent in FIFRA regulations that were published in 1959 and were effective and substantially unchanged throughout the 1960s and early 1970s. For example, the regulations made various suggestions for pesticide labeling statements, but made clear that the exact wording used in the suggested labeling statements was not obligatory; moreover, manufacturers were told to use any added warnings or caution statements that any special characteristics or uses of their formulations indicated were necessary. *See, e.g.,* 24 Fed. Reg. 10,835, 10,855 (1959) (codified at 7 C.F.R. § 362.116(d)). In the event that a registrant contemplated changes "in substance" in the labeling of a product, the regulations prescribed a procedure for obtaining a new or amended registration incorporating the changed label. *See* 24 Fed. Reg. at 10,848 (codified at 7 C.F.R. § 362.106(h)). In general, the regulations quite clearly and explicitly set out the very limited role of pre-1972 FIFRA, its registration process, and its labeling standards:

> (1) Registration is a device to bring the economic poison to the attention of the Department of Agriculture and to furnish an opportunity to correct *obvious* faults in labeling. It does not place the responsibility for correct labeling upon the Depart-

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to the newly-formed Environmental Protection Agency ("EPA") and its Administrator. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). FIFRA regulations were transferred to EPA without change, except that the words "Department of Agriculture" in the regulations were deemed to mean "Environmental Protection Agency." *See* 7 C.F.R. Ch. XXVII (1971).

> ment though the Department does advise relative to revision of labeling, on the basis of available information. . . .
>
> (2) Registration is not to be understood as indicating the Department of Agriculture's approval or recommendation of the economic poison.
>
> (3) Federal registration does not remove the requirements for state registration in those states which require registration.

24 Fed. Reg. at 10,847 (codified at 7 C.F.R. §§ 362.106 (d)(1)-(3)) (emphasis added). *See also* 24 Fed. Reg. at 10,849 (codified at 7 C.F.R. § 362.109(d)): "No references to [a guarantee that a product has been registered under FIFRA] may be made on the label or in the labeling of the product since such reference would be likely to give the purchaser an unwarranted sense of security."

As the Court of Appeals acknowledged in its original opinion in this case, *see* Pet. App. 33a, pre-1972 FIFRA contained no provisions specifically restricting state authority over pesticide labeling, in sharp contrast to the restrictions found in the current FIFRA's express preemption clause at 7 U.S.C. § 136v(b).

In light of the very limited role of pre-1972 FIFRA and its lack of any preemptive language regarding state authority over pesticide labeling, any contention that pre-1972 FIFRA might preempt state tort claims based on inadequate labeling or warning would seem highly implausible. It appears that those courts that have considered the question have concluded as much.[3]

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[3] *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 995 n.14 (2d Cir. 1980) (noting that FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates), *cert. denied*, 454 U.S. 1128 (1981); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (proceeding on the assumption that FIFRA did not occupy the field). *Cf. Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937,

In the instant case, it is undisputed that, although AP&G's claims of inadequate warning did not accrue under Colorado state law (for purposes of, for example, statutes of limitation) until after the discovery of penta contamination in 1987, those claims are based on acts and omissions that occurred prior to the 1972 Legislation. Moreover, as AP&G has repeatedly pointed out throughout this case, § 4(e) of the 1972 Legislation provides that,

> [f]or purposes of determining any criminal or civil penalty *or liability to any third person* in respect of any *act or omission* occurring before the expiration of the periods referred to in this section [which in no event could be earlier than October 21, 1972, when the 1972 Legislation was enacted], the Federal Insecticide, Fungicide, and Rodenticide Act shall be treated as continuing in effect as if this Act had not been enacted.

See 1972 U.S.C.C.A.N. at 1170 (emphasis added). On the basis of that express congressional directive that the 1972 Legislation have only prospective application, and on the basis of this Court's teachings regarding the propriety of applying subsequent enactments to prior conduct, AP&G argued in the courts below that the FIFRA preemption issue must, under the facts of this case, be analyzed under the FIFRA statute and regulations as they existed prior to the 1972 Legislation.

Both of the courts below rejected AP&G's contention, and elected to analyze the preemption issue under the current FIFRA regime. The District Court, citing this Court's opinion in *Bradley v. School Bd. of City of Rich-*

940, 944 (D.S.C. 1969) (manufacturer's duty to warn is over and above USDA's requirements); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15, 17-19 (Tex. Civ. App. 1968) (mere compliance with labeling standards of FIFRA and Texas Insecticide, Fungicide, and Rodenticide Act does not establish freedom from negligence as a matter of law).

mond, 416 U.S. 696 (1974), asserted that a court "is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice." Pet. App. 11a. Subsequently, in its original, later-vacated opinion, the Court of Appeals, though recognizing that *Bradley*'s presumption in favor of statutory retroactivity appears to be in conflict with this Court's later decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), *see* Pet. App. 34a n.1, nevertheless agreed with the District Court that pre-1972 FIFRA should not govern the preemption analysis. The Court of Appeals stated that applying the 1972 Legislation to this case simply does not present any issue of retroactivity, both because AP&G's cause of action "arose" after 1972 and because, even if the cause of action "ripened" prior to 1972, " 'a statute is not rendered retroactive merely because the facts or requisites upon which a subsequent action depends are drawn from a time antecedent to the enactment.' " *See* Pet. App. 35a (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972)). The only affirmative basis the Court of Appeals gave for applying the current FIFRA statute to this case was the court's expressed belief that a jury award today, though based on acts or omissions committed prior to the 1972 Legislation, would nevertheless have "an impact on FIFRA as it currently exists," because such an award would cause manufacturers to change their labels. *See id.* In concluding that the current FIFRA statute governs the preemption analysis in this case, neither court below even acknowledged the contrary congressional directive in § 4(e) of the 1972 Legislation, despite repeated citations to it in the parties' briefs, at oral argument, and in a petition for rehearing.

When this case first came before this Court, AP&G suggested several reasons for this Court's plenary review or summary reversal of the decision of the Court of Appeals to apply current FIFRA, rather than pre-1972 FIFRA, to the preemption analysis. *See* AP&G's First

Petition at 21-23. However, because the holding by the Court of Appeals on this "choice-of-law" issue was also contrary to this Court's analysis in the intervening decision of *Cipollone*, which consistently applied the federal statute in effect at the time of each allegedly tortious act of inadequate warning to determine whether later-accruing claims based on such act would be preempted, AP&G suggested that it might also be appropriate simply to vacate the judgment of the Court of Appeals and remand the case for further consideration of the issue in light of *Cipollone*. *See, e.g.*, AP&G's First Petition at 11, 23.

Following this Court's order of remand, directing further consideration in light of *Cipollone*, AP&G pointed out to the Court of Appeals that, under the *Cipollone* analysis, the court's now-vacated decision to apply current FIFRA, rather than pre-1972 FIFRA, had been erroneous and should not be reinstated. As AP&G noted, although the precise preemptive scope of each of the two federal cigarette labeling acts (the Federal Cigarette Labeling and Advertising Act (the "1965 Act")[4] and its successor, the Public Health Cigarette Smoking Act of 1969 (the "1969 Act")[5]) was the subject of great debate in *Cipollone*, there was one point on which there was no dissent—this Court would apply the federal statute in effect at the time of each allegedly tortious act or omission to determine whether later-accruing common-law tort claims based on each act or omission would be preempted.[6] Moreover,

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[4] Pub. L. No. 89-92, 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340.

[5] Pub. L. No. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340.

[6] *See, e.g.*, 112 S. Ct. at 2621-22 ("insofar as claims under either failure to warn theory require a showing that *respondents' post-1969 advertising or promotions* should have included additional, or more clearly stated, warnings, those claims are pre-empted") (Stevens, J., for the Court) (emphasis added); *cf. id.* at 2635 ("To the extent petitioner's claims are premised specifically on

the date on which each of the various plaintiffs' claims had accrued under state law—which was, at the earliest, July 23, 1981, when a spot, later diagnosed as cancer, was discovered on Rose Cipollone's lung during her regular medical check-up, *see Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 579-81 (3d Cir. 1990) (discussing application of two-year statute of limitation), *rev'd in part as to other matters*, 112 S. Ct. 2608 (1992)—would in no way determine which version of the federal statute governs the preemption analysis.

As AP&G also pointed out to the Court of Appeals, there is even less reason in the context of FIFRA to protect tortious conduct through the application of a subsequently enacted preemption provision. Unlike the statutory scheme under consideration in *Cipollone* (where there was apparently no express congressional directive to support this Court's application of pre-1969 law to pre-1969 conduct, and where there was even legislative history suggesting that the 1969 Act's preemption provision was only intended to "clarify" rather than change the 1965 Act's preemptive reach, *see* 112 S. Ct. at 2619), the introduction of preemptive language in FIFRA was accompanied by an express congressional directive, in § 4(e) of the 1972 Legislation, that pre-1972 FIFRA was to continue to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation.[7] Moreover, the lone affirmative basis that had been

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respondents' failure (during the period in which the 1965 Act was in force) to include in their advertising any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, pre-empted.") (opinion of Scalia, J.) (emphasis added; emphasis in original omitted).

[7] *See also, e.g., Goldstein v. California*, 412 U.S. 546, 551-52 (1973) (where congressional amendments to federal copyright law in 1971 expressly applied only to sound recordings that were "fixed" on or after February 15, 1972, the amendments could have no preemptive effect on state-law claims regarding recordings that were "fixed" prior to February 15, 1972).

given by the Court of Appeals for applying the current FIFRA statute—that is, its speculation that a jury award today, based on inadequate pesticide warning labels distributed twenty or more years ago, would cause manufacturers to change their labels tomorrow, thus having "an impact on FIFRA as it presently exists," *see* Pet. App. 35a—is no more persuasive in the pesticide-labeling context than it is in the cigarette-labeling context; among other things, in both contexts, manufacturers would presumably feel pressured to change their labels to avoid future liability only if the *current* federal statute did *not* preempt common-law tort claims that are based on the inadequacy of *current* labels.

In its opinion on remand, the Court of Appeals once again rejected AP&G's position. Characterizing the issue as a dispute about "when [AP&G's] claim arose," *see* Pet. App. 3a, the court first speculated that Rose Cipollone's claim [8] must have been "a continuing claim" that began with her exposure to the consequences of tobacco smoke in 1942, *see id.*, thus requiring this Court in *Cipollone* to analyze the preemptive scope of pre-1969 law as well as post-1969 law. The Court of Appeals contrasted that with the instant case, where, according to the court, "[n]either [AP&G] nor any of its employees had any exposure to defendants' products until [AP&G] moved onto the contaminated premises." *See id.* at 4a. However, according to the court, there was "a more significant reason" for rejecting AP&G's position on this issue—*Cipollone* never raised or decided an issue "about when the plaintiff's claim arose in that case." *See id.* On that basis, the Court of Appeals refused to reconsider its holding on the "choice-of-law" issue and refused to "augment the record" with the documents that had been filed with

[8] The Court of Appeals apparently failed to recognize that *Cipollone* involved claims of *three* persons—Rose, Antonio, and Thomas Cipollone—and the petitioner in this Court was Thomas Cipollone, individually and as executor of his parents' estates.

this Court and that AP&G had then submitted to the Court of Appeals to allow that court to view the scope of questions that had been presented and arguments that had been made to this Court. *See id.* at n.2.

In its subsequent petition for rehearing, AP&G contended that, if there was no discussion in *Cipollone* about when the various plaintiffs (Rose, Antonio, and Thomas Cipollone) were injured or when their claims "arose," that was only because one of the few issues that all of the justices of this Court seemed to agree on in *Cipollone* was that the preemption analysis was to be governed by the federal law in effect at the time of the allegedly tortious acts of inadequate labeling or failure to warn; there was simply no reason to consider any "issue" about when injuries occurred or claims arose.[9] Once again, however, AP&G's petition for rehearing was summarily denied. *See* Pet. App. 48a.

The Court of Appeals has been given every opportunity to articulate a coherent legal basis for its various suggestions that the governing law in the preemption analysis should be the law in effect at the time of injury, or the law in effect at the time the claim "arose," or the law in effect at the time suit was filed, or the law in effect at the time judgment was rendered. It has not done so,

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[9] AP&G also pointed out to the Court of Appeals that its speculative distinction between Rose Cipollone's "continuing claim" and AP&G's injuries was not only legally irrelevant (because the preemption analysis should be governed not by the law in effect at the time of injury or at the time a claim arose, but rather by the law in effect at the time of the allegedly inadequate warning or labeling, which, in the instant case, was prior to the 1972 Legislation), but also factually wrong; the record is clear that there was a continuity of ownership and operations on the Property for many years, and AP&G was simply the successor-in-interest to all assets and liabilities of the corporation ("Arkansas-Platte & Gulf, Inc.") that had owned the Property from 1966 to 1985. In that respect, perhaps, AP&G occupied a position similar to that of petitioner Thomas Cipollone in his role as executor of his mother's estate.

nor has it explained why it should not be required to apply the law in effect at the time of the allegedly tortious act or omission in labeling or warning, as *Cipollone* indicates should be done. In light of (i) the express congressional directive that pre-1972 FIFRA was to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation, (ii) the manifest implausibility of the contention that the express preemption provision in the 1972 Legislation was intended to grant immunity for labeling and warning practices that were unprotected, tortious acts and omissions when they were engaged in, (iii) *Cipollone*'s directive that express preemption provisions are to be narrowly read, *see, e.g.*, 112 S. Ct. at 2618, (iv) *Cipollone*'s application, in its preemption analysis, of the law in effect at the time of the allegedly tortious labeling or warning,[10] and (v) the decision of the Court of Appeals to narrowly construe this Court's remand order and to refuse to reconsider the prior holding on this issue in light of *Cipollone*, AP&G believes that it may now be most appropriate for this Court to summarily reverse the opinion of the Court of Appeals on this "choice-of-law" issue and remand the case with appropriate instructions.[11] However, in the alternative, AP&G requests that the petition be granted with plenary review to follow.[12]

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[10] *See also, e.g., Bennett v. New Jersey*, 470 U.S. 632, 638-46 (1985) (absent clear legislative intent to the contrary, substantive provisions of 1978 statutory amendments would not be retroactively applied in determining if funds were misused during 1970-1972; instead, the stricter standards that were in effect at the time of the allegedly wrongful conduct would be applied).

[11] *See, e.g., Powell v. Texas*, 492 U.S. 680, 680-81, 682-83, 686 (1989) (summarily reversing where lower court inadequately complied with reconsideration order); *Henry v. City of Rock Hill*, 276 U.S. 776, 776-78 (1964) (same).

[12] *See, e.g., United States v. Sharpe*, 470 U.S. 675, 680-81 (1985) (reversing upon plenary review after lower court, having received

II. AFTER THIS COURT VACATED THE JUDGMENT OF THE COURT OF APPEALS AND ORDERED RECONSIDERATION IN LIGHT OF *CIPOLLONE*, THE SUBSEQUENT HOLDING BY THE COURT OF APPEALS THAT CURRENT FIFRA EXPRESSLY PREEMPTS STATE COMMON-LAW TORT CLAIMS HAS REVIVED AND DEEPENED A SPLIT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

The first federal circuit court decision on post-1972 FIFRA's preemptive effect on state common-law claims of inadequate warning or labeling was the D.C. Circuit's decision in *Ferebee*,[13] which was issued in 1984, and which held that FIFRA neither expressly nor impliedly preempts state common-law actions based on inadequate labeling of pesticides. *Ferebee* stood as the only federal circuit court decision on this preemption issue until the Eleventh Circuit's 1991 *Papas* decision and the Tenth Circuit's original decision last year in the instant case. In each of those two decisions, the court acknowledged the holding in *Ferebee* but refused to follow it, finding instead that FIFRA impliedly preempts state tort claims of inadequate labeling or warning.

Subsequently, one state court of last resort and one additional federal circuit court ruled on this FIFRA preemption issue, with both courts expressly acknowledging the conflict among *Ferebee*, *Papas*, and the Tenth Circuit's original opinion in this case. In *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992), the Supreme Court of

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reconsideration order, declined "to reexamine [its] principal holding or to reargue the same issues that [had been] addressed in detail in [its] original majority and dissenting opinions").

[13] In 1980, the Second Circuit had stated broadly, and perhaps as dicta unnecessary to its disposition of the case, that "FIFRA was not intended to preempt state law even with respect to those matters which it specifically regulates." *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d at 995 n.14.

Arkansas held that "state common law tort claims for inadequate labeling are neither expressly nor impliedly preempted by FIFRA." 834 S.W.2d at 141-45. In *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), a case involving an EPA-registered herbicide, *see id.* at 1303, the Fourth Circuit reversed a district court's summary judgment that all of the plaintiffs' common-law tort claims were preempted by FIFRA, and instead held that, though a common-law claim could be preempted to the extent that it was based on a duty that "would impose a labeling requirement inconsistent with those established by FIFRA," *id.* at 1308, state common-law claims that are "based on breach of a federally imposed standard," *id.*, or based on a state-imposed standard that is identical to the federal standard, *see id.* at 1306, would not conflict with federal law and would not be preempted by FIFRA.

Five days after the Fourth Circuit's order reversing summary judgment in *Worm*, this Court issued its decision in *Cipollone*, holding that, where a federal statute contains an express preemption provision that provides a " 'reliable indicium of congressional intent with respect to state authority,' " that provision is to be given both exclusive and narrow effect, and there can be no resort to principles of implied preemption. *See, e.g.*, 112 S. Ct. at 2618 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)). In view of the current FIFRA's express preemption provision at 7 U.S.C. § 136v(b), the circuit court's implied preemption analysis in *Papas* and in the instant case now appeared to be clearly contrary to this Court's own framework for preemption analysis. Indeed, five days after the *Cipollone* decision, the circuit court opinion in *Papas* was vacated by this Court and remanded for further consideration in light of *Cipollone*.[14]

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[14] *See Papas v. Zoecon*, 112 S. Ct. 3020 (1992), *vacating Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991).

As matters developed, however, it became clear that neither this Court's guidance in *Cipollone* nor its summary disposition and remand of *Papas* would resolve the split in judicial authority regarding FIFRA's preemptive reach in matters of labeling and warning.[15] Three decisions illustrate the difficulties courts have had in interpreting and applying *Cipollone* in the context of FIFRA preemption.

1. Several weeks after this Court's decision in *Cipollone*, Judge Jack Weinstein of the Eastern District of New York, writing in *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992), noted that the D.C. Circuit's opinion in *Ferebee* "remains a leading case" on the issue of FIFRA preemption of common-law failure-to-

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[15] Numerous courts had spoken on this preemption issue prior to the remand in *Papas*. Among the many federal district court opinions on the issue, cases finding no preemption included *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928 (S.D. Tex. 1992); *Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339 (D. Mont. 1991); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136, 1990 U.S. Dist. LEXIS 19395 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224, 1989 U.S. Dist. LEXIS 17548 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986). Cases finding implied preemption included *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989). Cases finding express preemption included *Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406-08 (E.D. Mich. 1987).

warn claims, *see* 797 F. Supp. at 1138; however "[a]pplying the somewhat subtle distinctions of *Cipollone*," Judge Weinstein found that FIFRA does expressly preempt a limited set of claims involving allegations that a pesticide with an EPA-approved label is mislabeled. *See id.* at 1140. Judge Weinstein made clear, however, that FIFRA does not preempt, for example, claims that warnings apart from labels or packaging should have been used. *Id.* Judge Weinstein also rejected the defendants' claims of implied preemption, holding that, "even ignoring the directive in *Cipollone* to focus exclusively on express preemption clauses," "[t]he federalism issues are too important to warrant foreclosing recovery to an injured party on a questionable theory of implied preemption." *See id.* at 1141.

2. Approximately one month after Judge Weinstein's endeavor to apply the "somewhat subtle distinctions of *Cipollone*," the Nevada Supreme Court proclaimed that it did not find *Cipollone* "instructive" on whether FIFRA preempts state tort claims, and cited with approval Justice Blackmun's statement in *Cipollone* that he could "only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision." *See Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 933 n.2 (Nev. 1992) (quoting *Cipollone*, 112 S. Ct. at 2631 (Blackmun, J., concurring in part and dissenting in part)), *cert. denied*, 61 U.S.L.W. 3731 (U.S. April 26, 1993). The Nevada court proceeded to hold that, although FIFRA does not *expressly* preempt state tort claims of inadequate labeling, *see id.* at 933-34, it does *impliedly* preempt them. *See id.* at 934-38.[16]

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[16] As was later noted, the *Davidson* court thus "ignored *Cipollone*'s clearest directive—that when a statute contains an express preemption provision, a court should confine its analysis to an interpretation of the scope of the specific provision". *See The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 356 (1992).

3. In *Couture v. Dow Chem. Co.*, 804 F. Supp. 1298 (D. Mont. 1992), the defendants acknowledged that the district court had previously rejected the position that state common-law tort claims are preempted by FIFRA, *see Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339, 1342-45 (D. Mont. 1991), *appeal filed*, No. 91-36201 (9th Cir. Apr. 21, 1992), but urged the court to "retract" its holding in *Montana Pole* and instead find that this Court's recent pronouncements on preemption analysis had undermined the D.C. Circuit's holding in *Ferebee* and now warranted a holding of preemption. *See* 804 F. Supp. at 1300-03. The district court rejected the defendant's contentions and held that, among other things, this Court's preemption analysis in *Cipollone* supported the conclusion that common-law tort claims of inadequate warning are not preempted by FIFRA. *See id.* at 1301-03. The district court also refused to certify the preemption issue for interlocutory appeal, since, "cognizant of the pendency of a petition for certiorari to the United States Supreme Court in *Arkansas-Platte & Gulf Partnership*, the court is confident the preemption issue will be resolved by the United States Supreme Court in order to resolve the obvious split extant between the circuit courts of appeal." *Id.* at 1303 n.5.

On October 13, 1992, this court did, in fact, vacate the opinion of the Court of Appeals in this case—mitigating, if not precisely resolving, the circuit split. However, on January 5, 1993, the Court of Appeals issued its opinion on remand, holding that FIFRA expressly preempts state tort claims to the extent that they "require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA . . . ." *See* Pet. App. 6a. The Court of Appeals thereby became the first circuit court or state court of last resort to find that FIFRA expressly preempts common-law tort claims, in conflict with *Ferebee, Alter,* and *Davidson.*

On March 8, 1993, the Eleventh Circuit issued its opinion on remand in *Papas,* holding that FIFRA "expressly preempts state common-law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging." *See Papas v. Upjohn Co.,* 985 F. 2d 516, 520 (11th Cir. 1993).

There are now six published opinions from federal circuit courts and state courts of last resort regarding FIFRA's preemption of state common-law tort claims based on inadequate warning. They variously hold state common-law tort claims of inadequate warning to be expressly preempted, impliedly preempted, and not preempted at all. Moreover, lower court opinions issued after the opinion on remand in this case show a continuing conflict. *Compare MacDonald v. Monsanto Co.,* 813 F. Supp. 1258 (E.D. Tex. 1993) (applying *Cipollone,* rejecting the Tenth Circuit's opinion on remand in this case, and adopting the D.C. Circuit's holding in *Ferebee*) *with Levesque v. Miles Inc.,* Civil No. 92-94-JD, 1993 U.S. Dist. LEXIS 3395 (D.N.H. Mar. 18, 1993) (following the Tenth Circuit's holding upon remand in this case that FIFRA expressly preempts common-law failure-to-warn claims). The conflict among the holdings and competing rationales of *Ferebee, Alter, Worm, Davidson, Papas,* and the decision of the Court of Appeals in this case warrants resolution by this Court. *See* Rules 10.1 (a) & (b), Rules of the Supreme Court of the United States.

III. IN HOLDING THAT THE CURRENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING, THE COURT OF APPEALS HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Having refused to reconsider its holding that current FIFRA governs the preemption analysis, the Court of Appeals, in its opinion following remand, examined the current FIFRA's express preemption provision at 7 U.S.C. § 136v(b), which states that "[s]uch state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The court (i) held that § 136v(b) provides a " 'reliable indicium of congressional intent with respect to state authority,' " *see* Pet. App. at 5a (quoting *Cipollone*, 112 S. Ct. at 2618), (ii) noted a similarity between § 136v(b)'s "requirements" language and the 1969 Act's language ("[n]o requirement or prohibition") that was construed by this Court as preempting certain common-law claims, *id.*, (iii) inferred that a common-law duty to warn "is no less a 'requirement' in the preemption scheme than a state statute imposing the same burden," *id.* at 6a, and (iv) concluded that, "[t]o the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." *Id.*[17]

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[17] In addition, the court stated, in a final paragraph, and without elaboration, "[w]e hold *Cipollone* supports our previous judgment in this case. Accordingly, we ADHERE to the opinion previously announced in 959 F.2d 158." *See* Pet. App. at 6a (emphasis in original). Of course, the court's "opinion previously announced in 959 F.2d 158" held that "state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law." *See* Pet. App. at 42a. However, as *Cipollone* makes

By focusing primarily upon the similarity between § 136v(b)'s proscription of certain state-imposed "requirements" and the 1969 Act's proscription of certain state-imposed "requirement[s] or prohibition[s]," the Court of Appeals misconstrued the teachings of *Cipollone*. In *Cipollone*, this Court analyzed the express preemption provisions of the 1965 Act and the 1969 Act by considering the precise wording of the provisions, the statutory statement of purpose, the context of the congressional enactments, and general principles of statutory construction that are consistent with the general presumption against preemption. *See* 112 S. Ct. at 2618-19. Under a similar analysis, § 136v(b), like the preemption provision in the 1965 Act, can preempt only positive enactments, and not common-law damage actions, for the following reasons.

First, like the preemptive language in the 1965 Act, "Congress spoke precisely and narrowly" [18] in § 136v(b), where "*Such* State" (emphasis added) refers specifically to a state that, under § 136v(a), is engaged in the "regulation" of the sale or use of a federally registered pesticide in the state. *See* 7 U.S.C. §§ 136v(a)&(b), *supra* p. 2. "The term 'regulation' most naturally refers to positive enactments by [legislative and administrative]

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very clear, having found an express preemption provision that provides a "reliable indicium of congressional intent with respect to state authority," a court cannot, through principles of implied preemption, enlarge the preemptive scope of the federal statute to include areas not encompassed by a narrow construction of the express preemption provision. *See* 112 S. Ct. at 2618. In its petition for rehearing and suggestion for rehearing in banc, AP&G pointed out the inconsistency between the holding of express preemption and the stated adherence to the earlier opinion, and urged the Court of Appeals to modify and clarify its opinion on remand by removing the suggestion that the original, vacated opinion remains good law. The Court of Appeals declined to do so. *See* Pet. App. at 49a.

[18] 112 S. Ct. at 2618.

bodies, not to common law damages actions." 112 S. Ct. at 2619.

Second, regarding § 136v(b)'s restriction on such states' "requirements" for labeling, AP&G would note that, although this Court in *Cipollone* found that the 1969 Act's bar on "*requirement*[*s*] *or prohibition*[*s*] based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes" preempted certain common-law claims of inadequate warning, *see* 112 S. Ct. at 2619-22, the Court did not hold that the term "requirements" *necessarily* includes common-law duties; rather, the Court held that "requirements" *can* include such duties, and in light of the legislative history of the 1969 Act and its very extensive amendment of the 1965 Act's preemptive language, it appears that Congress intended some preemption of common-law actions. *See id.* at 2619-21. Indeed, in holding that the 1965 Act did not preempt common-law claims, this Court stated that "there is no general, inherent conflict between federal pre-emption of state warning *requirements* and the continued vitality of state common-law damages actions," including actions based on failure to warn. *See id.* at 2618 (emphasis added). Such preemption is consistent with a reading of the statute in question as having superseded only positive enactments by legislatures or administrative agencies, *see id.* at 2618-19, and the contrary conclusion of the Court of Appeals was error.

Third, under *Cipollone*, the 1965 Act's preemption provision was intended to further a goal of protecting against nonuniform labeling and advertising regulations—not to preempt common-law claims. *See, e.g.*, 112 S. Ct. at 2616, 2619. In FIFRA, the very heading of § 136v(b)—"Uniformity"—reflects that same narrow goal of preventing a multiplicity of conflicting state regulations; indeed, two sections earlier, the statute expressly refers to the goal of "securing uniformity of regulations." *See* 7 U.S.C. § 136t(b). "Regulations" refers to positive

enactments, not common-law damages actions. *See* 112 S. Ct. at 2620 n.19. Moreover, § 136v(b)'s exclusive concern with uniformity of labeling regulations, rather than preemption of common-law actions, was reinforced when FIFRA was extensively revised in 1988. *See* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655. Despite the D.C. Circuit's prior holding in *Ferebee*, and despite the presence and testimony of pesticide industry lobbyists (including representatives of defendant Dow) at the hearings that preceded the 1988 enactment, *see* H.R. Rep. No. 100-939, *reprinted in* 1988 U.S.C.C.A.N. 3474, 3517, the only change in § 136v(b) was the addition of the heading "Uniformity." "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and AP&G is unaware of any evidence that Congress was not comfortable with the D.C. Circuit's interpretation of § 136v(b) when it re-enacted the text of that section without change.

Finally, this Court has counseled that the purpose of Congress is the "ultimate touchstone" of preemption analysis. *See* 112 S. Ct. at 2617. In this regard, where the current FIFRA, unlike the statute considered in *Cipollone*, (i) does not expressly balance industry interests and public health, *cf. id.* at 2614 n.5 and accompanying text, (ii) does not mandate particular labels on products, but instead permits each manufacturer to draft and modify its own product labels subject to certain guidelines, *see generally* 47 C.F.R. Part 152,[19] and (iii) applies to thousands of different products, the dangers of which are not widely known, AP&G suggests that

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[19] Indeed, EPA itself has acknowledged that pesticide companies often voluntarily add "precautionary" statements to their labels, and do so for "liability reasons." *See* 49 Fed. Reg. at 37,971 (1984).

Congress would not use the language of § 136v(b) to express a "clear and manifest" intention to take away all recourse from persons who are injured by inadequate pesticide labels or warnings. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

In sum, § 136v(b), narrowly construed, cannot reasonably be held to expressly preempt common-law tort claims based on inadequate labeling, and the contrary conclusion of the Court of Appeals was error.

CONCLUSION

The petition for a writ of certiorari should be granted, with summary reversal or plenary consideration to follow.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,
v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

OPINION AND ORDER ON REMAND

[Filed Jan. 5, 1993]

Appeal from the United States District Court
for the District of Colorado
D.C. No. 89-S-1726

Richard R. Young, Brent E. Rychener, and Walter H. Sargent, Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey, Dean R. Massey, and Anne D. Weber, Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers Inc.

C. Michael Montgomery and Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

After examining the briefs this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(e); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This case is before us on remand from the Supreme Court. To aid our compliance with the mandate, we ordered the parties to file simultaneous briefs discussing the applicability of *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 112 S. Ct. 2608 (1992). Having considered the matters on file, we conclude we must adhere to the opinion previously rendered in this case. *Arkansas-Platte v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992).

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* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

The mandate gave no specific direction to us; therefore, the parties have differing views of the scope of the remand. Plaintiff, Arkansas-Platte, broadly reads the remand, but defendants take a more narrow view.

Plaintiff argues as a result of the remand our entire holding has been vacated, including our determination that pre-1972 law does not apply to this case. To the contrary, argue the defendants. They contend the Court has sent us only one issue for consideration and that is whether *Cipollone* reverses our holding that 7 U.S.C. § 136v(b) preempts a state common law duty to warn. Thus, our first consideration is to decide the effect of the Court's remand.

Plaintiff has always, but unsuccessfully, argued the law in effect in 1987, the year in which contamination was discovered, does not apply to its claims agaist defendants. It contends liability must be predicated upon defendants' conduct prior to the time of the discovery. That issue was hotly contested, and we resolved it in favor of defendants by holding the claim did not arise until after the 1972 amendment of FIFRA. *Arkansas-Platte*, 959 F.2d at 160-61. Without a lengthy discussion, we held plaintiff's claim did not exist until it acquired the contaminated property.

Plaintiff now contends the Court reversed this holding. It points out Mrs. Cipollone's cancer was not diagnosed until 1984; therefore, her claim did not arise until that time. Yet, the Court's analysis of the Cipollone claim took into account statutes that existed before 1984. Therefore, plaintiff reasons, the Court must have disapproved our analysis of when Arkansas-Platte's claim arose. This argument is not persuasive.

Mrs. Cipollone started smoking and therefore was exposed to the consequences of tobacco smoke in 1942. Thus, her claim must logically be a continuing claim that has its foundation in the events that occurred when

she first started to smoke. In contrast, until Arkansas-Platte came into possession of the contaminated property it had no claim against the defendants. Neither it nor any of its employees had any exposure to defendants' products until Arkansas-Platte moved onto the contaminated premises. Therefore, assuming plaintiff has any claim at all, it can only arise from its ownership of that land.[1]

Nonetheless, a more significant reason belies plaintiff's argument. We find no indication in *Cipollone* that a question was ever raised, let alone decided, about when the plaintiff's claim arose in that case. Thus, not only is the timing and nature of Mrs. Cipollone's claim different from that of the plaintiff in this case, but also her case reflects no holding of the Supreme Court about the ripening of that claim.

In short, although it is not disputed plaintiff has never given up on the issue of when its claim arose, we do not believe the remand encompasses our holding on that question. That belief is further supported by the fact that the only issue this case has in common with *Cipollone* is the issue of preemption. Therefore, we shall only reconsider our holding on that issue.[2]

After reviewing the briefs and the Court's holding, we conclude *Cipollone* does not require a conclusion different than the one we reached initially. We determined the legislative language relating to labeling contained in 7 U.S.C. § 136v(b) results in preemption, and *Cipollone* does not undercut that determination. Indeed, our conclusion is re-enforced because the labeling provision of § 136v(b) is as inclusive as that contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969,

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[1] We are not declaring, however, Arkansas-Platte has *any* claim against defendants. We refer only to the *time* whatever claim it may have arisen.

[2] Because of this analysis, augmentation of the record is unnecessary.

15 U.S.C. 1334(b), which the Court held constituted a preemption of state common law labeling and duty to warn claims. *Cipollone*, 112 S. Ct. 2621-22.

Section 136v(b) prohibits a state from imposing "*any* requirement for labeling or packaging in addition to or different from those required under this subchapter." (emphasis added). In comparison, section 5(b) of the Cigarette Smoking Act states:

> *No* requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(emphasis added). Although the words employed in § 136v(b) of FIFRA are different from those in § 5(b) of the Cigarette Smoking Act, their effect is the same. Section 136v(b) exists in the context of what federal law permits the state to regulate, and it simply deprives the state of power to adopt *any* regulation. This is as broad as the § 5(b) proscription.

We believe also the prohibition of "any" requirement is the functional equivalent of "no" requirement. We see no difference between the operative effect of the two acts.

Morover, when Congress, in § 136v(b) stated, "Such state shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required under this subchapter," it gave a "reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618. We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law. With the same stroke, Congress banned any form of state regulation, and the interdiction law is clear and irrefutable.

While plaintiff argues a congressional preemption of state law extends to positive legislative acts only, we do

not agree. When one looks to the purpose underlying both legislative regulation of labeling and packaging and a state common law duty to warn, it becomes evident those purposes are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden. The objectives of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label. That a common law action can result in an award of damages to an injured party does not detract from the ultimate purpose of imposing a duty to warn the users of a product about its potential dangers or other properties. Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute. *Cipollone,* 112 S. Ct. at 2620 (state regulation can be accomplished by an award of damages or by legislative enactment). A common law failure to warn case is inherently retrospective, measuring the consequences of what has already happened. A plaintiff's victory in such a case may only state the defendant's warning, if any, was insufficient, rather than specifying exactly what warning is requisite. The common law standard is generic. In contrast, the FIFRA warning scheme is prospective and specific. To the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted.

We hold *Cipollone* supports our previous judgment in this case. Accordingly, we ADHERE to the opinion previously announced in 959 F.2d 158. Appellee's motion to file a supplemental appendix is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS PLATTE & GULF PARTNERSHIP,
Plaintiff,

v.

VAN WATERS & ROGERS INC., *et al.*,
Defendants.

ORDER

[Filed Oct. 22, 1990]

THIS MATTER comes before the Court on Defendant Dow Chemical's motion for summary judgment, filed January 31, 1990. Oral argument on the motion was heard August 13, 1990.

PROCEDURAL BACKGROUND

Defendant Dow Chemical [1] bases its brief in support of summary judgment on three contentions: (1) the alleged failure to warn on the part of Defendant Dow, if any, did not cause plaintiff's damages as a matter of law; (2) Plaintiff lacks standing to bring an action for the property damages it seeks; and (3) Plaintiff's state law tort claims are preempted by federal law and accordingly are

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[1] Defendant Van Waters & Rogers has joined in the relevant pleadings by Dow Chemical in support of its motion for summary judgment.

barred. At the hearing of Defendant's motion, the first argument was withdrawn, as the Defendant conceded that the causality question was factual in nature. At that time, the Court also denied the second argument, determining that the standing issue concerned assignment which was an issue of fact. Having determined that summary judgment was improper on the Defendant's first two arguments, the Court took under advisement the third argument, concerning application of the preemption doctrine. This order will address exclusively the presumption argument.

Defendant Dow Chemical (hereafter "Dow"), alleges that the statutory scheme of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") found at 7 U.S.C. § 136 et seq., preempts the Plaintiff's cause of action cognizable under state tort law arising from an alleged failure to warn due to the inadequacy of the labeling of the chemical "Dowicide 7." [2]

FACTUAL BACKGROUND

It is undisputed that, during the years 1960-1972, Plaintiff's predecessors operated a wooden fence post treatment facility on their ranch property. The posts were soaked in a pentachlorophenol solution which greatly increased the durability of the posts. The chemical used in the procedure is more commonly referred to as "penta." Defendant's product "Dowicide 7" is a form of penta.

Plaintiff instituted this lawsuit claiming that the penta which was spilled or otherwise came into contact with the property caused the ranch to become a contaminated site. In their complaint, Plaintiff makes a negligent failure to warn claim, alleging that, among other things, the Defendants failed to provide any warning to the owners (of the property) of the potential environmental risks or

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[2] With regard to the Plaintiff's strict liability claim, the Defendant, relying on the decision of *Kennan v. Dow Chemical*, 717 F.Supp. 799 (M.D. Fla. 1989) makes no claim of preemption.

hazards to the property which might result from such use.

Plaintiff commenced the suit after it discovered penta contamination after the soil was tested. The soil tests were undertaken after the notification of the Plaintiff by one of its employees, Edward Seger, that he had been diagnosed as having penta poisoning. The Plaintiff's cause of action, however, does not concern Seger's personal injury.

Before this Court undertakes any analysis of the preemption question as it relates to FIFRA, and in particular the negligent failure to warn claim, it must be noted that there are several courts which have already considered this very question, and many more that have dealt with other questions regarding preemption. These cases will be noted and, where appropriate, discussed.

The wealth of case law on this issue is somewhat puzzling. The cases provide almost an even split of authority. There are some threads of consistency in determining some of these preemption questions. This Court will attempt to undertake an analysis which is not necessarily outcome determinative.

THE PLEADINGS

Defendant Dow Chemical filed its motion for summary judgment on January 31, 1990. Dow relies on two arguments in its preemption argument: (1) FIFRA preempts Plaintiff's negligence claim due to its comprehensive regulation of pesticides (focusing on the FIFRA provision found at 7 U.S.C. § 136v(b), entitled "uniformity," under the heading of 136v for "Authority of States." That provision states: "such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."); and (2) Plaintiff's tort claim based on the inadequacy of the label must fail as FIFRA prohibits any state regulation of the area of labeling, and any recovery under

state law would, in effect, amount to prohibited regulation. Dow relies heavily on the preemption analysis of *Kennan,* 717 F.Supp. 799 and *Fitzgerald v. Mallinckrodt,* 681 F.Supp. 404 (E.D. Mich. 1987).

Plaintiff's opposition was filed March 9, 1990. Plaintiff argued that there was no preemption of its negligence claim, relying on *Ferebee v. Chevron Chemical Co.,* 736 F. 2d 1529 (D.C. Cir. 1984) *cert. denied* 469 U.S. 1062 (1984) rejected Dow's arguments that EPA approval of a manufacturer's claim did not compel a jury to find the same, and distinguishing the different, but not competitive, goals of FIFRA and state tort law. Plaintiff maintained that the requirement of EPA approval of label does not prevent state from furthering traditional tort goals. Plaintiff cites to several cases which have adopted the *Ferebee* reasoning, or cited it with approval. (Including several federal as well as state cases.) Plaintiff also argues that since the FIFRA was extensively revised by Congress in 1988, after the *Ferebee* decision, and no effort was made to statutorily overrule the decision, it can be presumed that Congress has adopted that interpretation of FIFRA. Plaintiff criticizes also the *Fitzgerald* case for its reliance on *Palmer v. Liggett Group,* 825 F. 2d 620 (1st Cir. 1987), a case concerning the Cigarette Act. Plaintiff undertakes a rudimentary preemption analysis, and urges the Court to align itself with those decisions finding no preemption.

At oral argument of the motion before this Court on August 13, 1990, the Plaintiff raised an additional argument, to which Dow has responded, which urges the Court to apply pre-1972 law to Plaintiff's claims. This argument was effectively raised at the time of the hearing [3] and Dow filed its supplemental response on August 17, 1990. The Court will not concern itself with any analysis of pre-1972 FIFRA law and the status of Plain-

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[3] The argument was first raised by Plaintiff in a pleading filed (Friday) August 10, 1990 at 4:55 p.m. The oral argument was held the morning of August 13, 1990.

tiff's tort claims under such provisions. Plaintiff's arguments are unavailing and would only provide unnecessary confusion to the already muddy waters of preemption doctrine analysis. Because it appears that some of Plaintiff's claims may not have existed under pre-1972 FIFRA analysis, and the fact that the Court is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice, *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974), this order will not consider the pre-1972 FIFRA argument.

PREEMPTION DOCTRINE ANALYSIS

At the outset it must be noted that the Court properly considers a number of factors when undertaking a preemption analysis of statutory language or common law on either the federal or state level. The court must consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing,* 430 U.S. 519, 526 (1977).

The burden of proving preemption is on the movant. Dow must show that Congress intended to preclude state tort damage awards when it promulgated 7 U.S.C. § 136v (b) or as reflected in the FIFRA statute as a whole. The question is more accurately directed not towards whether Congress expressly allowed such damage awards, but rather, since tort damage awards have long been a part of traditional state tort law, to the question of whether Congress expressly supplanted them. Without an express preclusion of such awards, it must be assumed that such tort law principles would apply with full force and effect. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255 (1984).[4] Dow must overcome this burden.

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[4] It should be noted here, however, as the court in *Palmer v. Liggett Group, Inc.,* 825 F.2d at 628, pointed out, the *Silkwood* case involved the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.,* which contained no preemption provision.

1. The Historical Underpinnings of the Preemption Doctrine

The Supremacy Clause of Article XI, clause 2 of the United States Constitution provides: "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land. . . ." U.S. Const., Art. VI, cl. 2. It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough County, Fla. v. Automated Medical Labs*, 471 U.S. 707, 713 (1985), *citing Gibbons v. Ogden*, 9 Wheat. 1 (1824).

The preemption clause may apply to federal common law as well as state statutory or common law. Justice Rehnquist noted this distinction in *Milwaukee v. Illinois*, 451 U.S. 304 (1981):

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

The Supreme Court has articulated in *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986) an oft-cited listing of factors for preemption analysis, which has served to be instructive to many courts, but nonetheless offers little help in providing any practical means of analysis or "test" for trial courts:

> The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law. Preemption occurs when Congress, in

enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and having no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

See *Palmer v. Liggett Group, Inc.*, 825 F.2d at 624-625.

2. The Various Levels of Preemption Analysis

As evidenced by the listing of factors above in *Louisiana Public Service*, the court may consider any number of factors in its preemption analysis. This seems to be part of the problem and may lie at the source of the widely divergent decisions concerning application of preemption analysis. It is apparent that these factors, which were not intended to be an exhaustive treatment of the matter, must be tailored to the particular statute and regulatory scheme promulgated by Congress with a view to determining how the state law (as distinguished from the federal common law) or regulation may affect the federal provisions. In view of the cases on the subject, it is apparent that the only workable "test" is one which considers the statutory language, the entire statute, and its legislative history if necessary, in light of its relationship to the state common law provisions.

3. The Test

A. Express Preemption

Express preemption arises only in certain limited circumstances. Statutes which expressly supersede state law are not common. To determine whether there is express preemption, the court must consult the statute. *Louisiana Public Service*, 476 U.S. at 368. With regard to a finding that no express preemption exists, it is not necessary for a federal statute to provide explicitly that particular state laws are preempted. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (citing *Hillsborough County*, 471 U.S. 707.

(1) Examination of Statutory Provisions

Although inquiry into legislative motive is often an unsatisfactory venture, *United States v. O'Brien*, 391 U.S. 367, 383 (1968), it nonetheless may be necessary to the determination of the controversy before the court. All provisions in a statute should be given effect. *See U.S. v. Menasche*, 348 U.S. 528, 538-539 (1990). If express preemption is not found by the language of the statute,[5] then the next level of analysis concerns implied preemption. The difficulties of consistent preemption analysis generally begin with implied preemption, as the several factors of that analysis allow the courts a great amount of discretion to determine whether Congress impliedly preempted state law or regulations. As the First Circuit noted in *Palmer*, the gist of preemption is whether Congress (expressly) did or (impliedly) meant to displace state law or state law concepts in enacting the federal law. *Palmer*, 825 F. 2d at 625-626.

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[5] One court addressing the FIFRA statute in a preemption context, did find there was express preemption of the plaintiff's claim based on negligent labeling and failure to warn based on the statutory provision of 7 U.S.C. § 136v(b). *Fitzgerald v. Mallinckrodt*, 681 F.Supp. at 407. To this Court's knowledge, the *Fitzgerald* court is the only court to have found such language to expressly preempt such a claim under FIFRA.

B. Implied Preemption

Implied preemption presents questions which are completely different from the more superficial analysis required in express preemption. The broader issue here arises from the very fact that Congress acted. The court must look at the consequences of that action. The Supreme Court noted recently in *English v. General Electric Co.*, 110 S.Ct. 2270, 2279 (1990):

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply preemption of state remedies. The Court has observed: 'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for pre-emption.'

(Citing *Hillsborough County*, 471 U.S. at 719.)

On the other hand, it must be noted that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." *Ouellette*, 479 U.S. at 491, citing *Hillsborough County*, 471 U.S. at 713.

The more difficult questions begin here: did Congress impliedly preempt the awarding of state tort law damages by a jury when it promulgated 7 U.S.C. § 136v(b)? Some courts have formulated the answer to this question by essentially asking a different question: does the award of damages by a jury amount to state regulation of labeling and packaging which the Congress impliedly preempted in § 136v(b)?

To determine what Congress may have implied, it is necessary to consider the statutory provision in its proper context—the statute as a whole.

Two primary considerations must be noted in the implied preemption context:

> (1) the problem of resolving the potential conflict between § 136v(a) and § 136v(b). Several courts

have not entertained any alternative to the application of § 136v(b) to a plaintiff's state tort law claims for negligence arising from inadequacy of the label. Other courts have noted the provision of § 136v(a) which specifically allows the states to regulate the use of pesticides by states. This is but one of the conflicts created by the divergence of case authority on this subject.

(2) arising from (1) but also standing alone to a certain extent is the (revisited) question of congressional intent. The purpose of the statute is the "ultimate touchstone" of supremacy clause (preemption doctrine) analysis. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

Because the whole notion of implied preemption concerns the interpretation of congressional intent and purpose from the statutory language and history, it is important to keep in mind these basic rules of preemption doctrine analysis and construction:

(1) Congressional Purpose

As noted above, there is a wide divergence of case authority as to the statutory purpose and intent of Congress in promulgating the FIFRA and its regulatory scheme. The divergence applies not only to the particular provisions (*e.g.*, §§ 136v(a) and 136v(b)) and how courts have construed their relationship to the FIFRA as a whole, but also to the overall Congressional purpose in enacting FIFRA. It must be recognized that the relationship between the parts and the whole is a crucial one. Although many courts have deemed the analysis of Congressional intent as distasteful, this Court would be shirking its duties if it dismissed such analysis. The court is left no choice but to examine Congressional intent where there is no express preemption. If the Court found no express preemption, but failed to make an examination of the statutory purpose, the court would effectively be

allowing preemption of state laws or regulations merely because the Congress has taken some sort of action in the area.

Congressional Occupation of the Field

Congressional purpose is a legitimate determination in considering the factors of implied preemption. The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme. *Hillsborough County*, 471 U.S. at 714. Although occupation of the field is an otherwise established factor of preemption analysis, the *Silkwood* court noted in considering a state law punitive damages claim which defendants contend was preempted by the Nuclear Regulatory Act (which as previously noted did not contain a preemption clause) that occupation of the field was not the appropriate test, but rather whether, "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 464 U.S. at 256.

Conflict of State Law with Federal Law

The tests which follow the field preemption factor may be characterized as an extension of that test, but are also distinct. The possible incompatibility of the state with the federal law must be examined.

(1) actual conflict

In addition to express or implied preemption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). See also, *Pacific Gas & Electric Co. v. State Energy Resources Conservation*, 461 U.S. 190, 204 (1983).

(2) potential conflict

A relevant question here is whether compliance with both is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). A conflict which is not otherwise an "actual conflict" will also be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *International Paper Co. v. Ouellette*, 479 U.S. at 492, citing *Hillsborough County*, 471 U.S. at 713.

Incompatibility of State Law with Federal Goals

This is a broad question. It must take into consideration the interests of the state through its tort law, to provide compensation for injuries to its citizens and the federal government, in providing uniform regulation of chemicals used in FIFRA. Whether the court chooses to recognize so or not, the distasteful act of divining congressional intent is of necessity in any substantial preemption analysis, as implied preemption analysis, almost by definition, requires such an undertaking. The balancing of these competing interests has been recognized in the area of intellectual property, where the interest of the federal government, as well as that of the states, is carefully guarded.[6] One particularly relevant question for this stage of analysis is whether Congress intended a balance be struck in the statutory scheme as a whole. This is particularly apparent when the statutory provisions are considered as a whole, with particular attention paid to the provisions regarding state competence

[6] In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, Justice O'Connor noted the Court's history of analysis with regard to the field of intellectual property: "[t]hus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the valance struck by Congress in our patent laws. . . . Where it is clear how the patent laws strike that balance in a particular circumstance, that is not a judgment the State may second guess. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

in §§ 136v(a) and (b). The balance between state and federal authority can be distinguished at the level of implied preemption in the aforementioned ways because "we must bear in mind that not every state law that in some remote way may affect the [Congressionally occupied field] . . . can be said to fall within the preempted field. *English v. General Electric Co.*, 110 S.Ct. at 2278.[7]

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[7] In this recent decision, the Supreme Court reviewed the preemption of a plaintiff's claim for intentional infliction of emotional distress by a portion of the Energy Reorganization Act of 1974. The *English* Court considered three questions in particular in examining the preemption issue:

> (1) [C]ongress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Pre-emption fundamentally is a question of congressional intent, see *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988), and when Congress has made its intent known through explicit statutory language, the court's task is an easy one.
>
> (2) [I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "[W]here . . . the field which Congress is said to have pre-empted" includes areas that have traditionally been occupied by the States," congressional intent to supersede state laws must be " 'clear and manifest.' " *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) . . .
>
> (3) [S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143

APPLICATION OF THE ANALYSIS TO THE PRESENT CASE

Presented with this veritable smorgasbord of factors for consideration of this motion, the Court will apply the following test, which is premised on U.S. Supreme Court holdings on appropriate factors, as well as a context for their proper consideration.

With regard to the application of the test, the Court will examine two relevant portions of FIFRA, §§ 136v(a) and 136v(b). Both sections are discussed here based on the common factors applicable to them. While Plaintiff may characterize its claim as arising from the "use" of a pesticide, and consequently to which § 136v(a) would apply, the Defendant would characterize the claim as falling under § 136v(b), based on a damage award serving as an indirect regulation of labeling. Because the Court wishes to rise above any semantic distinction based on the particular terms used in the pleadings and relevant papers in this case, and because it feels compelled to examine statutory sections in their proper context, the application of the test will include both sections.

1. EXPRESS PREEMPTION: Is there specific statutory language evidencing congressional intent to preempt state law?

The relevant portion of FIFRA is found at 7 U.S.C. § 136v., entitled "Authority of States."

Analysis of § 136v(a), entitled "In general." This section provides: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not

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(1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

English v. General Electric, 110 S. Ct. at 2275.

permit any sale or use prohibited by the Act." This section is clearly an affirmative grant of authority to the states to regulate.

Analysis of § 136v(b), entitled "Uniformity." This section provides: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." Here it is apparent that, by reading this section both in its statutory context, as well as in light of the state law here concerned, there can be no express preemption. The statutory language is not so explicit as to warrant a finding of express preemption where both of the other subsections of § 136v describe affirmatively the state regulation of pesticides, and where the particular admonition to the states does not describe in any meaningful way which action or type of action is prohibited. There certainly is no mention of preemption of state tort claims in § 136v(b).

Accordingly, there is no express preemption found under either of the FIFRA sections under scrutiny here.

2. IMPLIED PREEMPTION

A. OCCUPATION OF THE FIELD: Does state law regulate conduct in a field that Congress intended the Federal Government to occupy exclusively?

The state law under scrutiny here is neither a statute nor a regulation of pesticides (or their labels). Rather, it is the Colorado common law tort of negligence. With this in mind, the Court will consider the federal government's action in the field, namely FIFRA.

FIFRA, at 7 U.S.C. § 136 *et seq.*, provides a means for protecting health, the environment and regulating standards. The regulatory scheme under FIFRA applies to some 40,000 chemicals or mixtures of chemicals used as pesticides. The Act classifies the pesticides and provides a framework for their registration with the Adminis-

trator (of the Environmental Protection Agency). The vast majority of statutory provisions concern the manufacture and sale, and penalties for improper use of pesticides. Registration of a pesticide is done by its manufacturer. If there is more than one manufacturer of a pesticide, there is no standard mandating that the Administrator insure uniformity in that only one (standard) label may issue.[8]

Occupation of the field may be inferred from a pervasive scheme of federal regulation. The scheme of federal regulation under FIFRA does not easily lend itself to a characterization as "pervasive" except as relates to the registration of pesticides, and even in that area there exists much flexibility (albeit under the authority of the EPA Administration).

With regard to § 136v(a), the affirmative grant of authority to states to regulate the sale and use of pesticides remains intact. No occupation of the field is evident here.

With regard to § 136v(b), a certain caveat must be noted: where the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States, congressional intent to supersede must be clear and manifest.[9] Due to the nature of the state law concerned, it remains unclear that the congressional intent under § 136v(b), as well as that supported by the statutory scheme as a whole, was intended to displace the otherwise available state tort remedy.

Having determined that field preemption is not indicative of any congressional intent to preempt the Plain-

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[8] See *Palmer v. Liggett Group* for distinctions drawn between the scheme of federal regulation between FIFRA and the Cigarette Act. 825 F.2d at 628-629.

[9] *See English v. General Electric Co.*, 110 S. Ct. at 2275, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

tiff's state tort claim, the Court now turns to the two remaining factors of implied preemption.

B. ACTUAL CONFLICT: Is it impossible for a private party (i.e., Dow) to comply with both state and federal requirements?

The state law requirement for the tort of negligent failure to warn would dictate that the manufacturer (or perhaps seller or distributor) exercise the requisite duty of care (assuming such duty is found to exist) to warn of any dangerous properties which could cause harm to Plaintiff or his property through the use of pesticides.

The federal law requirements in this regard mandate simply that the manufacturer register the pesticide, and prescribes the manner in which this is done. The FIFRA does not mandate such registration procedure for any stated purpose other than regulating pesticides and their use for the protection of humans and the environment. With such broadly stated goals in mind, the FIFRA provides a framework for regulating standards within the pesticide industry. The dearth of specific provision as to how such goals might be carried out is indicative of FIFRA's nature as setting forth minimum standards. These minimum standards stand in sharp contrast to other congressional regulatory schemes.[10]

For these reasons, there exists no actual conflict between the state law requirements and federal law requirements in FIFRA under either § 136v(a) or § 136v (b). There is no reason why a private party, situated as Dow is, could not comply with both sets of requirements.

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[10] Other regulatory schemes which indicate much more thorough involvement by the federal government include: intellectual property, *see Bonito Boats*, 489 U.S. at 152; labor relations, *see English*, 110 S. Ct. at 2279, n.8; and the Cigarette Act, *see Palmer*, 825 F.2d at 628.

C. POTENTIAL CONFLICT: Is the state law incompatible with federal goals? OR Did Congress leave no room for supplementary state regulation?

With regard to this question and its consideration after the actual conflict issue, it may appear academic to examine this question. However, the Court will undertake consideration of this question as it is possible that although no actual conflict exists, due to the nature of the relationship between the two sets of "regulation," a conflict could arise.

It goes without saying that the Court could not consider the question of whether a conflict will arise, as no such issue is presented, and if it were, it certainly would not be ripe for consideration at this time.

Once again, the Court must note the distinction between the two statutory sections under consideration here. Because the grant of authority contained in § 136v(a) for regulating the use of pesticides allows the states broad authority to regulate in that area, no potential conflict could arise here.

With regard to § 136v(b), however, the test at this point is critical as it hinges on interpretation—both of congressional intent and the type of state regulation which it prohibits. It must be noted again here, that the court is required to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing Co.*, 430 U.S. at 526. With the federal statute and its relevant regulations under consideration, the Court notes that the basic purpose of the statute is to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions. *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 196 (N.D. Ill. 1988) citing *Continental Chemiste Corp. v. Ruckelshaus*, 461 F. 2d 331, 335 (7th Cir. 1972).

In light of the meaning of § 136v(b) in context of the overall statutory purpose of FIFRA, the Court will now consider the consequences which the state law *may* have on this federal scheme of regulation. The state tort claim here at issue is an interest which may be characterized as "peculiarly local" in concern, due to its nature as a common law claim for negligence.[11] Any potential conflict which might arise from a jury award of damages cannot be characterized as a conflict with the statutory regulation scheme of FIFRA due to its failure to address any aspect of state tort recovery in either its statutory language or its regulation. It cannot be assumed that because it failed to specifically mention this possibility, it is nonetheless foreclosed. FIFRA's relatively flexible nature of regulating pesticides and their distribution forecloses such a conclusion.[12]

This Court accordingly finds that there is no potential conflict between the state tort claim and the FIFRA provision of § 136v(b).

In conclusion, the Court finds that there is no potential preemption of Piaintiff's state tort law claim for damages based on negligent failure to warn.

It is therefore ORDERED, Defendant Dow Chemical Company's motion for summary judgment is DENIED.

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[11] This "peculiarly local" classification is of concern here also with regard to whether Congress intended to displace the state tort claim for damages. *See National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465, 470 (E.D. Cal. 1980), citing *Florida Lime*, 373 U.S. at 146.

[12] One court has characterized this relationship in a somewhat similar manner with regard to implied preemption analysis: [t]he fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel a jury to find that the label is also adequate *for purposes of state tort law* a. well." (Emphasis in original.) *Ferebee v. Chevron Chemical Co.*, 736 F.2d at 1540.

DATED at Denver, Colorado, this 22nd day of October, 1990.

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Plaintiff,

v.

VAN WATERS & ROGERS, INC., a Washington corporation; THE DOW CHEMICAL COMPANY, a Delaware corporation; and XYZ COMPANIES,
Defendants.

ORDER

[Filed Jan. 22, 1991]

THIS MATTER comes before the Court on Defendant The Dow Chemical Company's motion for reconsideration of the Court's order entered October 22, 1990. The Defendant seeks this Court's reconsideration or amendment of its Order denying the Defendants' motion for summary judgment. As its basis for reconsideration or amendment, Dow Chemical Company asserts that the Court improperly considered its motion for summary judgment as limited only to preemption of Plaintiff's negligent failure to warn claim. Dow Chemical asserts that its motion was directed at *any* failure to warn claim, regardless of legal theory.

At this time the Court merely wishes to note that it appears the Defendant Dow Chemical Company is essentially seeking reargument of its motion. At the hearing on this motion, Defendant Dow Chemical relied primarily

on the decision in *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989) for its argument that FIFRA (Federal Insecticide, Fungicide and Rodenticide Act) preempts state law failure to warn claims (transcr. at 7). Both the *Kennan* court, as well as the argument forwarded by the Defendant Dow Chemical Company, rely for support on the earlier decision of *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D. Mich. 1987): "FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald* . . ." *Kennan*, 717 F.Supp. at 805. Of particular note is the court's ruling in *Kennan*, which states: "To the extent that plaintiff's claims are based on the defective and unreasonably dangerous condition of defendants' products due to defendants' failure to warn, plaintiff's claims are preempted as a matter of law. To the extent that plaintiff's claims are otherwise based on the defectiveness or unreasonable dangerousness of defendants' product on theories of defective design or manufacturing flaw, the motion for summary judgment is denied." *Id.* at 812.

Accordingly, the Defendant Dow Chemical Company's motion to reconsider is DENIED.

The Court hereby certifies its order of October 22, 1990 denying summary judgment for appeal pursuant to 28 U.S.C. 1292(b). Further proceedings in this matter shall not otherwise be stayed by this Court unless a party requests a stay of the proceedings within 10 days of this Order.

DATED at Denver, Colorado, this 22 day of January, 1991

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-527

THE DOW CHEMICAL COMPANY;
VAN WATERS & ROGERS, INC.,
Petitioners,

v.

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Respondent.

ORDER

Filed February 26, 1991

Before LOGAN and EBEL, Circuit Judges.

This matter comes on for consideration of the petition of The Dow Chemical Company and Van Waters & Rogers, Inc. for permission to appeal under 28 U.S.C. Section 1292(b).

Upon consideration whereof, the petition for leave to appeal is granted.

The date of this order shall serve as the date of the notice of appeal for calculating filing times under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Briefing shall follow 10th Cir. R. 31.1.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
D.C. No. 89-S-1726

[Filed Mar. 6, 1992]

Richard R. Young (Brent E. Rychener and Walter H. Sargent, with him on the briefs) of Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey (Dean R. Massey and Anne D. Weber, with him on the briefs) of Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers, Inc.

C. Michael Montgomery (Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado; and Edward B. Fitzpatrick, III, The Dow Chemical Company, Midland, Michigan, with him on the briefs), of Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Lawrence S. Ebner, McKenna & Cuneo, Washington, D.C.; Charles S. Siegel, Baron & Budd, P.C., Dallas, Texas; and Arthur H. Bryant and Priscilla Budeiri, Trial Lawyers for Public Justice, Washington, D.C., on the briefs for Amici Curiae.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

In 1985 plaintiff Arkansas-Platte & Gulf (AP&G) succeeded to ownership of property in Colorado which previously had been occupied by a wooden fence-post treatment facility. That facility used a pentachlorophenol product, "Dowicide 7," from approximately 1960 to 1972. In 1987, an AP&G employee was diagnosed with pentachlorophenol poisoning. AP&G filed suit in 1989 against Van Waters & Rogers and The Dow Chemical Company as pentachlorophenol manufacturers or distributors, asserting Colorado state tort claims of negligence and strict

* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

liability based on a failure to warn of the product's environmental hazards. Dow and Van Waters & Rogers moved for summary judgment, asserting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (FIFRA), preempts state common law tort claims based on labeling. The district court denied summary judgment, holding there was no express or implied preemption by FIFRA of state tort claims based on negligent failure to warn. *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474, 1482, 1484 (D. Colo. 1990).

On motion of the defendants, the district court certified this question for interlocutory appeal. We may take interlocutory appeals when there is a substantial question of law and an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292 (b). We review motions for summary judgment *de novo*. *City of Chanute, Kan. v. Williams Natural Gas Co.*, —— F.2d ——, 1992 WL 12682, at *2 (10th Cir. 1992). *See also Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987). If no genuine issue of material fact exists, we determine if the substantive law was correctly applied. *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990), citing *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). There is no dispute of fact on the preemption issue before us. The parties disagree about (1) what body of FIFRA law should be applied, and (2) whether state law is preempted. We reverse the denial of summary judgment to the defendants, and hold FIFRA impliedly preempts state tort actions based on labeling and alleged failure to warn.

I. Applicable Law

AP&G argues its claims originate from actions occurring from 1960 to 1972, and thus FIFRA provisions enacted in 1972 cannot affect defendants' pre-exposure

duties. In the alternative, AP&G asserts neither the 1947 Act nor the 1972 amendments preempt state common law failure to warn claims, and the distinction is unimportant. We disagree with both arguments.

While pre-1972 FIFRA law concerning labeling is similar to the legal regime set forth in the 1972 amendments, it is not identical. FIFRA was enacted in 1947 as a licensing and labeling statute replacing the Insecticide Act of 1910. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S. Ct. 2862, 2866 (1984). The 1947 Act gave the Agriculture Department authority to regulate, register, and label "economic poisons and devices." *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989). There was no provision in the 1947 Act, however, specifically restricting state authority over pesticide labels.

In contrast, the 1972 amendments significantly strengthened the Act's registration and labeling standards, constructing a comprehensive regulatory regime. *Wisconsin Pub. Intervenor v. Mortier*, —— U.S. ——, 111 S. Ct. 2476, 2480 (1991), citing *Ruckelshaus*, 467 U.S. at 991, 104 S. Ct. at 2867. The 1972 provisions sought to "regulate the use of pesticides to protect man and his environment," and "extend Federal pesticide regulations to actions *entirely within a single State*." *Kennan*, 717 F. Supp. at 804, citing S. Rep. No. 92-838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993. Section 136v, addressing the "authority of states" provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide . . . in the State, but *only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.*

(b) Uniformity

Such State shall not impose or continue in effect *any requirements for labeling or packaging in addition to or different from* those required under this subchapter.

7 U.S.C. § 136v(a), (b) (emphasis added).

A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to "regulate the sale or use" of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b). Section 136v(c) further examines the states' prerogatives for registering pesticides for uses to meet special local needs. Clearly if the 1947 Act did not specifically restrict state authority over labeling, the 1972 amendments instruct a different interpretation of the preemption of state law.

Like the district court, we find plaintiff's contention that we should apply pre-1972 FIFRA law unavailing. AP&G relies on *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 799 (1991), arguing the application of current FIFRA law to past events would present a question of retroactivity. *DeVargas* addressed the retroactive application of statutory amendments which became effective during the pendency of that litigation. The court held in the absence of clear congressional intent instructing retroactive application, the law should be applied prospectively. *DeVargas*, 911 F.2d at 1388, 1393.[1]

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[1] *DeVargas* found two lines of Supreme Court precedent, *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988), were in "irreconcilable conflict" in applying statutes whose intent on retroactivity is unclear. *DeVargas*, 911 F.2d at 1390. *Bradley* held when congressional intent is unclear,

If this case presented a question of retrospective application of a statute, we would indeed apply *DeVargas*. The issue here, however, does not concern retroactivity, but rather when plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989. Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment." *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427, 43 S. Ct. 154 (1922). *DeVargas* is therefore not on point.

Furthermore, any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists. As the court stated in *Kennan v. Dow Chem. Co.*, "[w]hether or not the decedent was exposed prior to 1972 does not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels . . . . Congress has expressly preempted such regulation by the states." 717 F. Supp. at 811. We therefore apply FIFRA as amended.

" 'a court is to apply the law in effect at the time it renders its decision,' " except where application of the law would result in "manifest injustice." *DeVargas*, 911 F.2d at 1388-389, citing *Bradley*, 416 U.S. at 711, 94 S. Ct. at 2016. *DeVargas* found *Bowen* stated a contrary rule, that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *DeVargas*, 911 F.2d at 1389, citing *Bowen*, 109 S. Ct. at 471. "Faced squarely with the issue [of] . . . which presumption—*Bradley* or *Bowen*—is to govern," the *DeVargas* court found *Bowen* was supported by the weight of Supreme Court authority, and held the Civil Rights Restoration Act of 1987 did not apply retroactively. *DeVargas*, 911 F.2d at 1392-93.

II. Preemption Doctrine

The preemption doctrine is based on the Supremacy Clause of Article Six of the Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws that interfere with, or are contrary to" federal law. *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 2375 (1985), citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.). The burden of proving preemption is on defendants, who must show Congress meant FIFRA to preempt state tort claims based on failure to warn.

Preemption turns on the intent of Congress and on the effect of the conflicting rule. Intent may be express, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977), or inferred when Congress has chosen to occupy a particular field and "a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. at 2481, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). Even when the field is not occupied, we may still infer preemption to the extent state and federal law conflict. This may be when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-18 (1963), when federal law implies a barrier to state regulation, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986), citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

III. Failure to Warn Claims Based on Labeling

Several courts have considered whether FIFRA preempts state tort claims based on labeling and alleged failure to warn with conflicting results. The Eleventh Circuit held state common law tort labeling claims are impliedly preempted by FIFRA, 7 U.S.C. § 136v(b). *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *petition for cert. filed,* 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837).[2] While FIFRA explicitly instructs states can regulate the *sale or use* of federally registered pesticides, § 136v(b) precludes "any requirements for *labeling or packaging* in addition to or different from those required pursuant to this act." *Id.* (emphasis added). The *Papas* court reasoned jury awards of damages in these actions would result in direct conflict with federal law. *Id.* at 1025. We agree.

The Administrator of the EPA is charged under the statute with determining whether the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). The EPA considers these adverse effects in determining what labels comply with FIFRA's requirements. 7 U.S.C. § 136a(c)(5)(B). The labels " 'must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment' " *Papas,* 926 F.2d at 1024, citing 40 C.F.R. § 156.10(i)(1)(i).

State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the

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[2] *Compare Kennan v. Dow Chem. Co.*, 717 F. Supp. at 807 ("FIFRA expressly preempts state law regulation of pesticide labeling . . . ."); *and Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987) ("Congress has expressly stated its intent to preempt any state labeling or packaging requirements different from or additional to those mandated by FIFRA," citing § 136v(b)).

accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards. *Papas* noted even if a state tort action accomplished the same goal as the federal statutory provisions, federal law would still preempt the state action because "it attempts to achieve that purpose by a method which interferes with the federal methods." 926 F.2d at 1026, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497, 107 S. Ct. 805, 813 (1987).

We decline to follow the D.C. Circuit's holding in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984), as suggested by AP&G. *Ferebee* involved a suit by the estate of an agricultural worker against Chevron alleging Chevron's failure to label paraquat with an adequate warning caused Mr. Ferebee's lung disease and subsequent death. The D.C. Circuit held the tort action was not preempted by FIFRA, basing its holding on the general grant of authority to the states in § 136v(a) to regulate the use of FIFRA-controlled products within state borders. *Ferebee*, 736 F.2d at 1541. We do not agree with the D.C. Circuit that because labeling can be part of the compensatory objectives of the state in regulating use, the general grant of § 136v(a) encompasses authority over labeling.[3] Section 136v(b) clearly narrows the general grant of § 136v(a) to *exclude* "requirements for labeling or packaging."

Ferebee distinguished between the "direct" injunction against the states' imposing labeling requirements and requirements which might be imposed through state common law. *Id.* The court reasoned the EPA's determination that Chevron's label was adequate *"for FIFRA pur-*

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[3] "Given this provision [§ 136v(a)], Maryland might well have the power to ban paraquat entirely . . . . As a result, Maryland is entitled to control the use of paraquat for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label." *Ferebee*, 736 F.2d at 1541.

poses does not compel a jury to find that the label is also adequate *for purposes of state tort law . . . .*" *Ferebee*, 736 F.2d at 1540 (emphasis in *Ferebee*). *Ferebee* further stated:

> The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label . . . .

Ferebee, 736 F.2d at 1541.[4]

We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional. As the First Circuit stated in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987):

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label.

Id. at 627-28. This choice cannot be consistent with FIFRA's preclusion of "any requirements for labeling or packaging in addition to or different from" the statutory mandate. 7 U.S.C. § 136v(b).

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[4] *See also Ferebee*, 736 F.2d at 1542 ("Compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.").

AP&G relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), which stated there was no "irreconcilable conflict between the federal and state standards," and that the "imposition of a state standard in a damages action" would not "frustrate the objectives of the federal law." 464 U.S. at 256, 104 S. Ct. at 626. We distinguish *Silkwood* because it construes the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, a statute with substantially different regulatory and safety goals from FIFRA. The Atomic Energy Act contains no pre-emption provision and reserves significant authority to the states. "Further, the enactment and legislative history [of the Act] make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue." *Palmer v. Liggett Group*, 825 F.2d at 628. In contrast, FIFRA does specify restrictions on state authority in labeling, and the legislative history of FIFRA is not clear on the question of state common law tort actions based on labeling and failure to warn.

Our thinking is bolstered by the Supreme Court's recent decision in *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In *Mortier*, a Wisconsin town granted plaintiff a permit for pesticide spraying with certain use restrictions. Plaintiff claimed the town ordinance was preempted by FIFRA and state statute. The Supreme Court disagreed, holding FIFRA did not preempt political subdivisions from regulating the *use* of pesticides, "either explicitly, implicitly, or by virtue of an actual conflict." *Id.* at 2482. The Court found FIFRA had not occupied the field of pesticide regulation in general or of local use permitting in particular. *Id.* at 2486. According to *Mortier*, the specific grant of authority in § 136v(a) ensures the states can "continue to regulate *use and sales* even where, such as with regard to the banning of *mislabeled products*, a *narrow pre-emptive overlap* might occur." *Id.* (emphasis added).

This "narrow preemptive overlap" is precisely the issue before us. In dicta addressing FIFRA's preemption of labeling claims, the Court stated:

> [F]ield pre-emption cannot be inferred. In the first place, § 136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). *This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation.*
>
> *Id.* at 2486 (emphasis added).[5]

Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly preempted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* at 2479, we are nevertheless inclined to adopt its construction of FIFRA.[6]

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[5] *See also* 111 S. Ct. at 2487. "As we have . . . made plain, local use permit regulations—*unlike labeling or certification*—do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." (emphasis added).

[6] Several district courts have considered preemption with respect to labeling and failure to warn claims since *Mortier* and followed its dicta. *See, e.g., Young v. American Cyanamid Co.*, Civ. No. B-C-90-89 (E.D. Ark. N.D. Oct. 21, 1991) (unpublished order); *Worm v. American Cyanamid Co.*, Civ. A. No. HAR-90-1424, 1991 WL 144328 (D. Md. July 12, 1991) (unpublished opinion). *Cf. Montana Pole & Treating Plant v. I.F. Laucks*, 775 F. Supp. 1339 (D. Mont. 1991) (adopting *Ferebee* and declining to follow *Papas* in case involving labeling of pentachlorophenol). In our opinion, *Montana Pole* wrongly relies on *Mortier* without considering the Court's

IV. Summary

We therefore hold state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law. This is by virtue of the direct conflict posed with federal uniform regulation of pesticides, and because we believe Congress intended to occupy the field of pesticide labeling regulation. We base our holding on the language of § 136v, our rejection of the *Ferebee* court's "choice of reaction" analysis, and our understanding of the Supreme Court's construction of FIFRA in *Mortier*. We need not reach the district court's holding there is no express FIFRA preemption, and emphasize our holding only concerns the narrow issue of labeling. We do not address other state tort claims by AP&G which may be pending against the defendants.[7]

We therefore REVERSE the decision of the district court denying defendants' summary judgment on plaintiff's state tort claims based on labeling and failure to warn, and REMAND for further proceedings.

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distinction between preemption of state regulation of the *sale and use* of pesticides, and state authority over *labeling*. *Montana Pole*, 775 F. Supp. at 1344.

[7] *See, e.g., Kennan*, 717 F. Supp. at 812 (while finding express preemption of failure to warn claims in § 136v(b), court "state[d] no view as to whether . . . defense of unavoidable dangerousness ha[d] been preempted"); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989) (FIFRA preempts common law failure to warn claims, but not claims that herbicide sold in unreasonably dangerous condition).

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK
Washington, D.C. 20543

October 13, 1992

Mr. Walter H. Sargent
Holme, Roberts & Owen
90 South Cascade Avenue, #1300
Colorado Springs, CO 80903

Re: Arkansas-Platte & Gulf Partnership
v. Dow Chemical Company, et al.
No. 92-203

Dear Mr. Sargent:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Cipollone v. Liggett Group, Inc., 505 U.S. —— (1992).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085
(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants,

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,

Amici Curiae.

ORDER

Filed October 19, 1992

Before LOGAN, MOORE, Circuit Judges, and ALLEY*, District Judge.

The court on its own motion orders the parties to file, within twenty days of the date of this order, a memorandum brief not to exceed fifteen pages addressing the applicability of Cipollone v. Liggett Group, Inc., 505 U.S. 112 S. Ct. 2608 (1992).

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

---

* Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085
(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation;
Defendants Appellants.

ORDER

Entered April 16, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and ALLEY*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

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* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085
(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants,

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

ORDER

Entered February 9, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,

BRORBY, EBEL, and KELLY, Circuit Judges, and ALLEY*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Barbara Schemerkin
Deputy Clerk

---

* Honorable Wayne E. Alley, United States District Court for the Western District of Oklahoma, sitting by designation.

Supreme Court, U.S.
FILED
JUN 30 1993
OFFICE OF THE CLERK

No. 92-1784

IN THE

Supreme Court of the United States

October Term, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Tenth Circuit, after consideration of this Court's decision in *Cipollone v. Liggett Group, Inc.*, correctly reaffirmed its earlier holding that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y (1988 & Supp. II 1990) pre-empts state law tort claims which are based upon an alleged failure to warn.

2. Whether there is any sufficient reason for this Court to review the Tenth Circuit's determination under Colorado law that Petitioner's state law property damage claims arose no earlier than 1985 and are governed by FIFRA as it existed at such time.

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No. 92-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF

Respondents The Dow Chemical Company and Van Waters & Rogers Inc. respectfully request that this Court deny Arkansas-Platte & Gulf Partnership's petition for writ of certiorari (the "Petition") and not disturb the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado, *see* Pet. App. 7a, is reported at 748 F. Supp. 1474 (D. Colo. 1990). The original opinion of the United States Court of Appeals for the Tenth Circuit, *see* Pet. App. 30a, reported at 959 F.2d 158 (10th Cir. 1992), *reh'g denied*, No. 91-1085

(10th Cir. Apr. 16, 1992), *see* Pet. App. 46a, was vacated by this Court and remanded for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). *See* 113 S. Ct. 314 (1992). The opinion and order on remand of the United States Court of Appeals for the Tenth Circuit, *see* Pet. App. 1a, is reported at 981 F.2d 1177 (10th Cir. 1993), *reh'g denied*, No. 91-1085 (10th Cir. Feb. 9, 1993), *see* Pet. App. 48a.

JURISDICTION

The opinion and order on remand of the United States Court of Appeals for the Tenth Circuit was entered on January 5, 1993. *See* Pet. App. 1a. A timely motion for rehearing was denied on February 9, 1993. *See* Pet. App. 48a. Respondents received the referenced Petition on May 12, 1993. By letter dated May 25, 1993 the Clerk of this Court extended the time for Respondents to file a brief in opposition to and including July 1, 1993. *See* App. at A-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990), provides in pertinent part as follows:

> § 136v. *Authority of States*
>
> (a) *In general*
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) *Uniformity*
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> * * * *

§ 136(p) *Label and labeling.*

(1) *Label.*—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) *Labeling.*—The term "labeling" means all labels and all other written, printed, or graphic matter—

(a) accompanying the pesticide or device at any time; or

(b) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Department of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

* * * *

The Environmental Protection Agency has promulgated Labeling Requirements for Pesticides and Devices at 40 C.F.R. Part 156 (1992).

STATEMENT OF THE CASE

This is a product liability action involving the pesticide pentachlorophenol ("penta"), which is regulated by FIFRA. Petitioner, Arkansas-Platte & Gulf Partnership ("Petitioner"), filed its Complaint on or about September 1, 1989 against The Dow Chemical Company ("Dow")[1] and Van Waters & Rogers Inc. ("VW&R")[2] (hereinafter collectively referred to as "Respondents"), alleged manufacturers and/or distributors of the subject penta.

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[1]The parent companies and subsidiaries (except wholly owned subsidiaries) of The Dow Chemical Company are as follows: Marion Merrell Dow Inc., and Destec Energy, Inc.

[2]Van Waters & Rogers Inc. has no wholly owned subsidiaries. Univar Corporation is the parent company of Van Waters & Rogers Inc.

The Complaint alleges that certain property, presently owned by Petitioner, became contaminated by penta utilized from 1960 to 1972 in a wood treatment operation conducted by a previous owner of the property. Petitioner did not own the subject property until June 20, 1985, and asserts that its claim arose, at the earliest, in 1987. The Complaint contains claims premised upon state law theories of negligence and strict liability, both of which are based wholly on an alleged failure to warn regarding the consequences of using penta.

Respondent Dow moved for summary judgment, and was joined by Respondent VW&R, on grounds that FIFRA pre-empted the state law failure to warn claims asserted by Petitioner. The United States District Court for the District of Colorado denied Respondents' Motion by Order dated October 22, 1990. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 748 F. Supp. 1474 (D. Colo. 1990). By subsequent Order of January 22, 1991, that court amended its ruling to certify the issue for appeal pursuant to 28 U.S.C. § 1292(b) (1988). *See* Pet. App. at 28a.

Respondents then petitioned the United States Court of Appeals for the Tenth Circuit for leave to appeal the trial court's denial of summary judgment. The Tenth Circuit granted Respondents' petition to appeal on February 26, 1991. *See* Pet. App. 29a. After briefing and oral argument, the Tenth Circuit issued its opinion of March 6, 1992, reversing the district court's denial of summary judgment to Respondents, and holding that the state law failure to warn claims asserted by Petitioner were pre-empted by FIFRA. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 959 F.2d 158 (10th Cir. 1992) (hereinafter "*Arkansas-Platte I*"); *see* Pet. App. 30a.

Petitioner filed its first petition for writ of certiorari on July 30, 1992. This Court granted the 1992 petition for a writ of certiorari, vacated the Tenth Circuit's decision in *Arkansas-Platte I* and remanded that case to the Tenth Circuit for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). *See* 113 S. Ct. 314 (1992); Pet. App. 43a.

Pursuant to an Order of the Tenth Circuit dated October 19, 1992, both Petitioner and Respondents submitted briefs addressing the pre-emptive scope of FIFRA in light of this Court's *Cipollone* decision. *See* Pet. App. 44a. On January 5, 1993, the Tenth Circuit unanimously reaffirmed its previous holding that FIFRA pre-empts all state law tort actions which are premised upon an alleged failure to warn. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 981 F.2d 1177 (10th Cir. 1993) (hereinafter *"Arkansas-Platte II"*); *see* Pet. App. 1a-6a. The Tenth Circuit found that its previous holding of pre-emption in *Arkansas-Platte I* was "re-enforced" by *Cipollone* because the pre-emption language of the cigarette labeling statute at issue in *Cipollone* was similar to the language contained in FIFRA, 7 U.S.C. § 136v(b). *See* 981 F.2d at 1179; Pet. App. 4a. Petitioner subsequently filed the instant petition for writ of certiorari. *Arkansas-Platte II, petition for cert. filed*, 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784).

SUMMARY OF ARGUMENT

This case involves only state law tort claims based on an alleged failure to warn, and the Tenth Circuit's holdings below are so limited. *See Arkansas-Platte I*, 959 F.2d at 164; Pet. App. at 42a; *Arkansas-Platte II*, 981 F.2d at 1179; Pet. App. at 6a. The proceedings below and the Petition herein do not address, and do not affect, any other state law claims which might be asserted by Petitioner.[3]

FIFRA is federal legislation designed, inter alia, to provide a comprehensive and strictly controlled packaging and labeling

[3]During the pendency of Respondents' Motion for Summary Judgment, Petitioner filed a "Motion for Clarification" which requested the trial court to acknowledge that Petitioner had pled claims in addition to failure to warn claims. By Order dated December 13, 1990, the trial court denied Petitioner's "Motion for Clarification," thereby leaving failure to warn as the sole basis for Petitioner's state law claims of negligence and strict liability. Thereafter, Petitioner filed a Motion to Amend its Complaint to allege claims in addition to failure to warn. This Motion is still pending before the trial court.

scheme for pesticides. FIFRA's statutory and regulatory framework, as well as its legislative history, demonstrate clear congressional intent that regulation and control over the labeling of pesticides be vested solely with the United States Environmental Protection Agency ("EPA").

Congress' enactment of 7 U.S.C. § 136v(b) within FIFRA clearly evinces its intent that the states not impose "any requirements" differing from labeling requirements established by the EPA under FIFRA. A determination of inadequate warning by a jury would constitute impermissible state law regulation of pesticide labeling. The Tenth Circuit has twice properly determined that FIFRA pre-empts Petitioner's state law failure to warn claims.

A review of this Court's relevant pre-emption opinions in *Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991)*, *Cipollone,* and *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992) leads inexorably to the conclusion that state law requirements regarding the labeling of FIFRA-regulated pesticides, including failure to warn tort claims, are pre-empted by FIFRA. Accordingly, there is no special or important reason why this Court should review the FIFRA pre-emption issue addressed by the Tenth Circuit.

Similarly, there is no conflict between the United States Courts of Appeals or state courts of last resort that warrants review of the FIFRA pre-emption issue. Following this Court's 1992 decision in *Cipollone*, all United States Courts of Appeals and state courts of last resort that have considered this issue have been unanimous in finding that FIFRA pre-empts state law failure to warn claims.

Additionally, there is no special or important reason why this Court should review the Tenth Circuit's determination that, under Colorado law, Petitioner's property damage claim arose (if at all) no earlier than 1985, and that such claim is governed by FIFRA as it existed at that time. The Tenth Circuit's application of FIFRA to Petitioner's claims is in accordance with long-stand-

ing decisions of this Court and does not raise an issue of retroactivity. *See, e.g., Reynolds v. United States*, 292 U.S. 443 (1934); *Cox v. Hart*, 260 U.S. 427 (1922). Petitioner's assertion that § 4(e) of the 1972 FIFRA legislation constitutes an express Congressional directive preserving third-party tort actions such as this one is a misstatement of law which Petitioner has twice urged upon the Tenth Circuit and which was properly rejected on each occasion. Section 4(e) of the 1972 legislation deals solely with effective dates of new provisions introduced by that legislation. Again, no issue is presented for review by this Court.

REASONS FOR DENYING THE WRIT

I. THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S RECENT PRE-EMPTION DECISIONS; THE TENTH CIRCUIT CORRECTLY REAFFIRMED ITS EARLIER DECISION THAT PETITIONER'S STATE LAW FAILURE TO WARN CLAIMS ARE PRE-EMPTED BY FIFRA.

The 1991 decision in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), is the only decision issued by this Court to have addressed the pre-emptive scope of FIFRA. In *Mortier*, this Court reviewed the issue of whether a town ordinance that placed restrictions on the *use* of pesticides was pre-empted by FIFRA, 7 U.S.C. § 136v(a). In analyzing the scope of FIFRA pre-emption, this Court compared the congressional grant of authority to states for the regulation of pesticide *use*, 7 U.S.C. § 136v(a), with Congress' withholding of state authority to regulate pesticide *labeling* and *packaging*, 7 U.S.C. § 136v(b):

> The provision immediately following the statute's grant of regulatory authority to the States [with respect to pesticide *sale or use*] declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire

> field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling and packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.
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> * * * *
>
> [L]ocal use permit regulations—unlike labeling or certification—do not fall within an area that FIFRA's "program" pre-empts . . . .

Mortier, 111 S. Ct. at 2486-87 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)).

Commenting on *Mortier*, the Tenth Circuit, in *Arkansas-Platte I*, noted:

> Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly pre-empted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* 111 S. Ct. at 2479, we are nevertheless inclined to adopt its construction of FIFRA.

Arkansas-Platte I, 959 F.2d at 163 (emphasis in original, footnote omitted). Following, inter alia, this reasoning in *Mortier*, the Tenth Circuit held that state law labeling and failure to warn claims are pre-empted by FIFRA. Respondents are not aware of any federal appellate court decision subsequent to *Mortier* which has held to the contrary.

The Tenth Circuit's holding, in addition to being consistent with *Mortier*, is also supported by the other recent pre-emption decisions by this Court in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), and *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992).

In *Cipollone*, the Court reaffirmed that "the purpose of Congress is the ultimate touchstone of pre-emption analysis." 112 S. Ct. at 2617 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). Express pre-emption and implied pre-emption are both analytical mechanisms by which courts seek to determine such congressional purpose and intent. Nothing in *Cipollone* indicates that this Court intended to undermine or abrogate the traditional implied pre-emption analysis in all cases in which the statute involved contains any type of express pre-emption language. This is best illustrated by this Court's decision in *Gade*, which pre-dated *Cipollone* by only a few days.

In *Gade*, five justices found that the Occupational Safety and Health Act of 1970, 84 Stat. 1590 (the "OSH Act") and its federal regulations pre-empted a state regulation which required training for persons working with hazardous materials.[4] Although Justice Kennedy reached this conclusion on the basis of express pre-emption, Justice O'Connor's plurality opinion relied on an implied pre-emption analysis. The plurality opinion emphasized that express and implied pre-emption analyses are not "rigidly distinct" or mutually exclusive; the presence of an express pre-emption clause did not foreclose an implied pre-emption analysis:

> Justice Kennedy, while agreeing on the pre-emptive scope of the OSH Act, finds that its pre-emption is express rather than implied. The Court's previous observation that our pre-emption categories are not "rigidly distinct," *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990), is proved true by this case. We, too, are persuaded that the text of the [OSH] Act provides the strongest indication that Congress intended the promulgation of a federal safety and health standard to pre-empt all nonapproved state regulation of the same issue, but we cannot say that it rises to the level of express pre-emption.

Gade, 112 S. Ct. at 2386 n.2 (citations omitted in part).

[4]The OSH Act is an elaborate regulatory scheme similar to FIFRA in that both statutes are complex and supported by comprehensive regulations administered by federal governmental agencies.

Thus, consistent with *Cipollone* and *Gade*, the presence of pre-emptive language in § 136v(b) did not restrict the Tenth Circuit to only an express pre-emption analysis to reach the conclusion that FIFRA pre-empts state law failure to warn claims. The ultimate issue is congressional intent, and the Tenth Circuit's conclusion in both *Arkansas-Platte I* and *Arkansas-Platte II* that FIFRA pre-empts state law failure to warn claims was and is a correct one.[5]

II. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS OR STATE COURTS OF LAST RESORT THAT WARRANTS CERTIORARI REVIEW OF FIFRA PRE-EMPTION OF STATE LAW FAILURE TO WARN CLAIMS.

Every United States Court of Appeals and every state court of last resort which has addressed the subject of FIFRA pre-emption subsequent to this Court's decisions in *Cipollone* and

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[5]Petitioner urges that the Court below "misconstrued" *Cipollone* in its finding that "requirements" as found in 7 U.S.C. § 136v(b) includes state law damage actions. Petition at 27-28. However, Petitioner, rather than the Court of Appeals, has misconstrued *Cipollone*, the pertinent portion of which reads as follows:

> [Petitioner] argues that common-law damage actions do not impose "requirement[s] or prohibition[s]" and that Congress intended only to trump "state statute[s], injunction[s], or executive pronouncement[s]." We disagree; such an analysis is at odds both with the plain words of the 1969 Act [Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87] and with the general understanding of common-law damage actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common-law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Cipollone, 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)).

Gade has determined that state law failure to warn claims are preempted.[6]

On August 12, 1992, the Supreme Court of Nevada in *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 936 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (April 26, 1993), concluded:

> First, the excerpts from the legislative history demonstrate that Congress intended section 136v(b) to "completely preempt" state authority to change federal labeling. *See, e.g.*, H.R. Rep. No. 511, 92d Cong., 2nd sess. 1-12(1972). Second, it is unlikely that Congress would have designated federal control over labeling in section 136v(b) if it thought that the provision could be circumvented by state action authorized by § 136v(a). Third, federal regulation of pesticide labeling created by FIFRA is "so pervasive" and "so dominant" such that Congress left no room for the states to supplement it.

Davidson, 834 P.2d at 936.

Thereafter, on January 5, 1993, the Tenth Circuit Court of Appeals in *Arkansas-Platte II* reaffirmed its earlier holding of preemption, stating:

> After reviewing the briefs and the Court's holding, we conclude *Cipollone* does not require a conclusion different than the one we reached initially. We determined the legislative language relating to labeling contained in 7 U.S.C. § 136v(b) results in preemption, and *Cipollone* does not undercut that determination. Indeed, our conclusion is re-enforced because the labeling provision of § 136v(b) is as inclusive as that contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b), which the Court held constituted a preemption of state common law labeling and duty to warn claims.

Arkansas-Platte II, 981 F.2d at 1178-79.

Subsequent to *Arkansas-Platte II*, the Eleventh Circuit Court of Appeals in *Papas v. Upjohn Company*, 985 F.2d 516 (11th Cir.

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[6]The federal district court and lower state court opinions cited by Petitioner do not provide a basis for granting the Petition. Sup. Ct. R. 10.1.

1993) (hereinafter "*Papas II*"), *petition for cert. filed*, 61 U.S.L.W. 3836 (U.S. June 7, 1993) (No. 92-1938), reaffirmed its earlier holding of FIFRA pre-emption, stating:

> FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted." *See Cipollone*, 505 U.S. at __, 112 S.Ct. at 2621-22. Thus the *Cipollone* opinion dictates, under an express pre-emption analysis, the same result we reached earlier under the implied pre-emption doctrine.

Papas II, 985 F.2d at 518.

Most recently, the Seventh Circuit Court of Appeals in *Shaw v. Dow Brands, Inc.*, 1993 WL 166324 (7th Cir. May 18, 1993), also found that FIFRA pre-empts state law failure to warn claims, noting:

> In order to succeed in the wake of *Cipollone*, then, Shaw would have to show that FIFRA's pre-emption language is less sweeping than the language of the 1969 Cigarette Act. Yet we can discern no significant distinction at all—FIFRA says that "[s]uch State shall not impose . . . any requirements for labeling or packaging in addition to or different from those required . . . ," while the cigarette law says "[n]o requirement[s] or prohibition[s] . . . imposed under State law" shall be permitted. Both seem equally emphatic: "[n]o requirements or prohibitions" is just another way of saying a "[s]tate shall not impose . . . any requirements." Not even the most dedicated hair-splitter could distinguish these statements. If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA.

Shaw, 1993 WL 166324 at *6.

Davidson, Arkansas-Platte II, Papas II and *Shaw* comprise all of the federal courts of appeals and state courts of last resort

which have addressed the FIFRA pre-emption issue after *Cipollone* and *Gade*.[7] All of these decisions are uniform in holding that FIFRA pre-empts state law failure to warn claims. Accordingly, there is no conflict which would justify granting the petition for writ of certiorari.

III. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE DOES NOT RAISE AN ISSUE AS TO RETROACTIVE STATUTORY APPLICATION, IS CONSISTENT WITH ESTABLISHED SUPREME COURT PRECEDENT, INCLUDING *CIPOLLONE*, AND, AS A MATTER OF STATE LAW INTERPRETATION, HAS NO NATIONAL SIGNIFICANCE.

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE VERSION OF FIFRA TO BE APPLIED WAS AN ISSUE OF STATE LAW INTERPRETATION AND THAT RETROACTIVITY WAS NOT AN ISSUE IN THIS CASE.

Petitioner contends that the pre-1972 version of FIFRA should apply to the facts of this case even though it has asserted claims for relief based upon post-1972 Colorado law[8] and even though the Tenth Circuit has twice determined that Petitioner's Colorado state law property damage claims arose no earlier than 1985.

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[7]The only federal court of appeals decision and the only decision by a state court of last resort which have held that FIFRA does not pre-empt state law failure to warn claims pre-date *Cipollone* and *Gade*. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992). Accordingly, these cases do not present a basis to grant the Petition. In any event, *Ferebee* and *Alter* rely upon an analysis which was severely criticized even prior to *Cipollone* and *Gade*. In addition, these cases are contrary to the *Mortier* decision, which was handed down subsequent to *Ferebee* and which the court in *Alter* did not address.

[8]For example, Petitioner's failure to warn claim is based in part on strict liability, a cause of action that was not adopted by the Supreme Court of Colorado until 1975. *See Hiigel v. General Motors Corp.*, 544 P.2d 983 (Colo. 1975).

See Petition at 13. The Tenth Circuit's application of the current codification of FIFRA to Petitioner's claims does not represent a retroactive application of FIFRA. As the Tenth Circuit correctly recognized in *Arkansas-Platte I*:

> The issue here, however, does not concern retroactivity, but rather when the plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989.

959 F.2d at 160; Pet. App. 35a. In *Arkansas-Platte II*, the Tenth Circuit properly reaffirmed its earlier decision in this regard:

> Plaintiff has always, but unsuccessfully, argued the law in effect in 1987, the year in which contamination was discovered, does not apply to its claims against defendants . . . we resolved [that issue in *Arkansas-Platte I*] in favor of defendants by holding the claim did not arise until after the 1972 amendment of FIFRA . . . we held plaintiff's claim did not exist until it acquired the contaminated property [in 1985].

981 F.2d at 1178; Pet. App. 3a.

Petitioner is wrong when it asserts that the Tenth Circuit refused to reconsider, in light of this Court's *Cipollone* decision, its holding in *Arkansas-Platte I*. *See* Petition at 9, 19. To the contrary, the Tenth Circuit devoted almost half of its *Arkansas-Platte II* opinion to Petitioner's so-called "choice of law" issue.[9] *See* 981 F.2d at 1178; Pet. App. 2a-4a. After careful analysis of the Petitioner's and Respondents' briefs on the applicability of *Cipollone*, the Tenth Circuit concluded that the "only issue this case has in common with *Cipollone* is the issue of preemption." 981 F.2d at

[9]Application of the post-1972 version of FIFRA to the facts in this case is neither a "choice of law" issue as described by Petitioner in the instant Petition, nor a "retroactivity" issue as described by Petitioner in its previous briefs. Rather, the application of the post-1972 version of FIFRA to the facts of this case is required, as a matter of state law, because Petitioner has asserted state law claims that arose no earlier than 1985 when it acquired the property.

1178; Pet. App. 4a. The Tenth Circuit correctly recognized that there was:

> [N]o indication in *Cipollone* that a question was ever raised, let alone decided, about when the plaintiff's claim arose in that case. Thus, not only is the timing and nature of Mrs. Cipollone's claim different from that of the plaintiff in this case, but also her case reflects no holding of the Supreme Court about the ripening of that claim.

981 F.2d at 1178; Pet. App. 4a. This holding is consistent with this Court's comments in *Cipollone*:

> [W]e must look to each of petitioner's common law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition ... imposed under State law with respect to ... advertising or promotion," ... We consider each category of damages actions in turn. In doing so, *we express no opinion on whether these actions are viable claims as a matter of state law; we assume arguendo that they are.*

112 S. Ct. at 2621 (emphasis added).

The point in time at which Petitioner's failure to warn claims arose is a matter of state law interpretation. The Tenth Circuit, having jurisdiction over Petitioner's claims based upon diversity of citizenship, was bound to apply Colorado law in its determination that Petitioner's claims arose no earlier than 1985 and the law in effect at that time applied to such claims. *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no reason to review the Tenth Circuit's decision in this regard. The issue is limited to the interpretation of Colorado law as it pertains to the date of accrual of a state law property damage claim and is of no national significance.[10]

[10]Moreover, Petitioner's arguments are without merit because application of pre-1972 FIFRA would not change the Tenth Circuit's con-

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B. PETITIONER HAS MISINTERPRETED AND MISAPPLIED § 4(e) OF THE 1972 LEGISLATIVE DIRECTIVE.

Most egregious, among all of Petitioner's arguments, is its contention that § 4(e) of the 1972 legislation[11] constitutes a congressional directive that the legislation have prospective application only. *See* Petition at 13. Petitioner's analysis of the statute is patently incorrect and taken wholly out of context. Section 4(e) must be read in the context of the remainder of § 4, particularly § 4(c) and § 4(d).[12] The express congressional purpose of § 4 was

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clusion that state law failure to warn claims are pre-empted. This Court has previously noted that as first enacted in 1947, FIFRA was primarily a licensing and labeling statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Although the 1972 amendments provided substantial changes governing the use of pesticides (*see, e.g.*, 7 U.S.C. § 136b and § 136c), there were few significant changes in the labeling scheme imposed by the pre-1972 version of the Act. *See generally Ruckelshaus*, 467 U.S. at 991-92 (recognizing the congressional intent that "[t]he [1972] amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute"). The regulation of and restrictions upon manufacturers' labels was very stringent under both the pre-1972 law and the post-1972 law. *See Ruckelshaus*, 467 U.S. at 991 (specifically noting that § 2(u)(2) and § 3(a)(3) of the 1947 Act set forth the types of information necessary for proper labeling of a registered pesticide including warnings to prevent harm to people, animals, and plants).

None of the four cases cited by Petitioner for the proposition that FIFRA did not pre-empt state tort law warning claims prior to the 1972 amendments actually supports that proposition. *See In re "Agent Orange" Product Liab. Litig.*, 635 F.2d 987, 995 n.14 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) (noting in dicta that FIFRA does not displace the entire body of state product liability laws, a proposition which Respondents concede); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (specifically noting that the pre-emption issue was not argued); *Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937 (D.S.C. 1969) (addressing regulatory compliance as a defense, but not addressing pre-emption directly); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Texas App. 1968) (not raising the issue of pre-emption).

[11]Pub. L. No. 92-516.

[12]Sections 4(c) and 4(d) describe the new programs and other statutory modifications enacted by the 1972 legislation. For example, the

(Footnote continued on following page)

only to make new criminal and civil penalties and liabilities to third persons established by the 1972 amendments "effective gradually over a four-year period because of its complexity and problems involved . . . ." S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4060. To construe § 4(e) as somehow pertaining to state common-law tort claims is to take that portion of the legislative directive wholly out of context and is inconsistent with the plain language of § 4 when read in its entirety.[13]

The Tenth Circuit's application of the post-1972 codification of FIFRA necessarily results from the undisputed determination, as a matter of Colorado law, that Petitioner's state law property damage claims, if any, could not have arisen earlier than 1985. There is no special or important reason for this Court to review the Tenth Circuit's decision. Petitioner's request for certiorari review or, alternatively, for remand of this case, should be denied.

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1972 Act created both criminal and civil penalties and liabilities to third persons. *See, e.g.*, 7 U.S.C. § 136l (criminal and civil penalties) and 7 U.S.C. § 136m (liability to third party purchasers of pesticides who suffer loss as a result of a registration suspension or cancellation). Section 4(e), when read in context with the other provisions of § 4, simply indicates that, for example, the criminal and civil liabilities created by FIFRA, even though part of the October 21, 1972 enactment, would not become effective until the expiration of the time period specified in § 4.

[13]Both U.S.C.A. and U.S.C.S. annotators agree:

> Effective date. [referring to indemnity section, 7 U.S.C. § 136m] Section effective at the close of October 21, 1972, except if regulations are necessary for the implementation of any provision that becomes effective on October 21, 1972, and continuation in effect of the provisions of subchapter I of this chapter and regulations thereunder as in effect prior to October 21, 1972, until superseded by provisions of Pub. L. 92-516 and regulations thereunder, see section 4 of Pub. L. 92-516, set out as a note under section 136 of this title.

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CONCLUSION

The Tenth Circuit, after careful consideration of this Court's decision in *Cipollone*, correctly reaffirmed its earlier holding that FIFRA pre-empts state law tort claims based upon an alleged failure to warn. All other federal appellate courts and state courts of last resort that have addressed this FIFRA pre-emption issue after *Cipollone* and *Gade* are uniform in holding that FIFRA pre-empts state law failure to warn claims. Therefore, there is no conflict nor any special or important reason for this Court to grant certiorari on the FIFRA preemption issue.

There also is no sufficient reason for this Court to review the Tenth Circuit's determination, under Colorado law, that Petitioner's state law property damage claims arose no earlier than 1985 and are governed by FIFRA as it existed at that time. This determination is a matter of state law interpretation with no national significance.

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7 U.S.C.A. § 136m (Historical Note). Also:

> Effective date of section: [referring to indemnity section, 7 U.S.C. § 136m] For effective date of this section, see § 4 of Act Oct. 21, 1972, P.L. 92-516, 86 Stat. 998, set out at 7 U.S.C.S. § 136 note.

7 U.S.C.S. § 136m (History; Ancillary Laws and directives). *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 862 n.4 (1990) ("Congress may delay the effective date of a statute for many reasons having nothing to do with retroactivity, particularly if the statute is complex.") (White, J., dissenting).

Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 25, 1993

C. Michael Montgomery
MONTGOMERY, GREEN, JARVIS, et al.
1050 Seventeenth Street
Suite 2300
Denver, CO 80265

Re: Arkansas-Platte and Gulf Partnership
v. The Dow Chemical Company and Van Waters
& Rogers, Inc.
No. 92-1784

Dear Mr. Montgomery:

Your request of May 24, 1993 for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including July 1, 1993.

Very truly yours,

WILLIAM K. SUTER, Clerk

By /s/

Francis J. Lorson
Chief Deputy Clerk

cc: Richard R. Young

Supreme Court, U.S.
FILED
AUG 5 1993
OFFICE OF THE CLERK

No. 92-1784

IN THE

Supreme Court of the United States

October Term, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,

Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
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THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents The Dow Chemical Company and Van Waters & Rogers Inc., in accordance with Sup. Ct. R. 15.7, respectfully inform this Court of the First Circuit Court of Appeals' recent decision in *King v. E.I. Du Pont de Nemours and Co.*, 1993 WL 232939 (1st Cir. July 7, 1993) [hereinafter *"King"*]. The *King* decision is supplemental authority which supports Respondents' position as presented in their Brief in Opposition, submitted to this Court on June 30, 1993, in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 981 F.2d 1177 (10th Cir. 1993) [hereinafter *"Arkansas-Platte II"*], *petition for cert. filed,* 61 U.S.L.W. 3789 (U.S. May 10, 1993) (No. 92-1784).

In *King*, the First Circuit held that, in light of this Court's ruling in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y (1988 and Supp. IV 1992), pre-empts state law tort claims which are based upon alleged failure to warn theories:

> *Cipollone* held that the words in the 1969 cigarette statute " '[n]o requirement or prohibition'...easily encompass[ed] obligations that take the form of common law rules." *Cipollone,* 112 S. Ct. at 2620. The FIFRA language prohibiting the states from "impos[ing] or continu[ing] in effect any requirements," 7 U.S.C. § 136v(b), is virtually indistinguishable from the state-imposed "requirement" language that *Cipollone* held preempted the state common law tort claims based on inadequate warning. FIFRA's language, too, preempts the state law lack-of-warning claims involved in this case.

1993 WL 232939, **3-4. The First Circuit also rejected *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.) *cert. denied*, 469 U.S. 1062 (1984), as unpersuasive in light of *Cipollone* and the three other post-*Cipollone* Courts of Appeals FIFRA decisions:

> In deciding *Ferebee*, the District of Columbia Circuit did not have the benefit of the Supreme Court's subsequent analysis and ruling in *Cipollone*. It is impossible to predict whether, in light of *Cipollone* and the [three] other courts of appeals' decisions discussed above [i.e. *Arkansas-Platte II, Papas II,* and *Shaw v. Dow Brands, Inc.*], the District of Columbia Circuit would continue to follow *Ferebee*. In any event, for the reasons set forth in this opinion, we do not find *Ferebee* persuasive.

1993 WL 232939, *5.

The *King* decision demonstrates that, contrary to Petitioner's assertions, there is no conflict between the United States Courts

of Appeals or state courts of last resort on the pre-emptive scope of FIFRA; all such courts which have addressed the FIFRA pre-emption issue after this Court's decisions in *Cipollone* and *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), have unanimously held that FIFRA pre-empts state law failure to warn claims. The First Circuit thus joins the Tenth Circuit Court of Appeals in *Arkansas-Platte II*; the Eleventh Circuit Court of Appeals in *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) [hereinafter "*Papas* II"], *petition for cert. filed sub nom. Papas v. Zoecon Corp.*, 61 U.S.L.W. 3836 (U.S. June 7, 1993) (No. 92-1938); the Seventh Circuit Court of Appeals in *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); and the Supreme Court of Nevada in *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (April 26, 1993), which have all held that FIFRA pre-empts state law failure to warn claims.

Respondents request that this Court deny the petition for writ of certiorari.

Respectively submitted,

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